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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment to the 1990 census violated the Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners, defendants below, are: United States Department of Commerce; Ronald H. Brown, Esq., As Secretary of the United States Department of Commerce; Everett Ehrlich, As Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Harry Scarr, As Acting Director of Bureau of Census; William J. Clinton, As President of the United States; Dan Glickman, As Secretary of Agriculture; Donna E. Shalala, As Secretary of Health and Human Services; Henry Cisneros, As Secretary of Housing and Urban Development; Robert B. Reich, As Secretary of Labor; Federico Peña, As Secretary of Transportation; Richard W. Riley, As Secretary of Education.

Respondents, plaintiffs below, are: City of New York; State of New York; City of Los Angeles; City of Chicago; City of Houston; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; Jerry Alan Wood; Carolyn Sue Lopez; City of Atlanta, Georgia; Maynard Jackson, Individually, and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City

of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernadino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona; Council of Great City Schools. By virtue of Rule 12.4 of this Court, the State of Wisconsin and the State of Oklahoma, intervenor-defendants below, and Donnald K. Anderson, As Clerk of the United States House of Representatives, a defendant below, are also respondents in this Court.

The following were parties to the proceedings in the district court, but were not parties to the proceeding in the court of appeals: People of the State of California *ex rel.* Daniel E. Lungren, Attorney General; and County of Hudson, New Jersey.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States Department of Commerce, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40)[2] is reported at 34 F.3d 1114. The opinions of the district court (Pet. App. 41-95, 96-120, 121-134) are reported at 822 F. Supp. 906, 739 F. Supp. 761, and 713 F. Supp.

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[1] Petitions for a writ of certiorari filed by the State of Wisconsin and the State of Oklahoma have been docketed in this Court as Nos. 94-1614 and 94-1631, respectively.

[2] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 94-1614.

48. The decision of the Secretary of Commerce (Pet. App. 135-415) is published at 56 Fed. Reg. 33,582.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1994. The petition for rehearing filed by the State of Oklahoma was denied on December 12, 1994. Pet. App. 419-421. The petition for rehearing filed by the State of Wisconsin was denied on January 4, 1995. Pet. App. 416-418. On March 27, 1995, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 4, 1995. On April 25, 1995, Justice Ginsburg further extended the time within which to file to and including June 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clause 3, of the United States Constitution; the Fifth Amendment and Section 2 of the Fourteenth Amendment to the Constitution; 2 U.S.C. 2a; and 13 U.S.C. 141(a) and (b) are reproduced in relevant part at Pet. App. 422-425.

STATEMENT

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 (the Apportionment Clause) provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers," and directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." See also Amend. XIV, § 2 ("Representatives shall be apportioned among the several States

according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

Congress has assigned to the Secretary of Commerce the responsibility for conducting the decennial census and has vested the President with the responsibility for establishing and reporting the apportionment of Representatives following completion of the census. The Census Act provides that the decennial census shall be conducted by the Secretary of Commerce "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). Congress has, however, prescribed a strict timetable for the census. The population of the United States is to be determined as of April 1 of the census year. The "tabulation of total population by States" for the purpose of apportionment of Representatives is to be completed and reported to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Within a week of the beginning of the first session of Congress following the census, the President must transmit to Congress a statement showing "the whole number of persons in each State * * * and the number of Representatives to which each State would be entitled" under the statutorily prescribed formula for apportioning Representatives. 2 U.S.C. 2a(a). Within 15 days of the receipt of that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b). Following the 1990 decennial census, the President transmitted the statement of the apportionment of Representatives required by 2 U.S.C. 2a(a) to Congress on January 3, 1991. 27 Weekly Comp. Pres. Doc. 6 (1991).

2. a. The 1990 decennial census was conducted in accordance with an elaborate, multi-staged procedure designed to locate and identify each housing unit in the country and to enumerate each person in those units by

means of a system replete with rechecks and cross-checks.[3] Although those processes resulted in an extraordinary rate of success, many persons were not counted. The Secretary of Commerce originally estimated that the census enumeration failed to count approximately 2.1% of the population. Pet. App. 158. It was subsequently determined, however, that that estimate significantly overstated the undercount, and the Census Bureau represented at the trial in this case that the undercount was 1.6% of the population. *Id.* at 58 n.12.[4]

It is undisputed that the undercount varies among population subgroups. Pet. App. 138-139, 158. Members of racial minorities are undercounted at a greater rate than nonminority residents. *Ibid.*[5] A differential undercount also exists, however, among various other subgroups. For example, men are missed at a higher rate than women, the young are missed at a higher rate than the elderly, and renters are missed at a higher rate than homeowners. DX 1, at 457-458.

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[3] This process included the development of comprehensive maps of each block in the United States, the identification of housing units on each block, test censuses and post-enumeration survey tests, the actual enumeration (including multiple contacts with each household that did not return a census questionnaire), and pre- and post-census review by state and local governments. See generally Pet. App. 319-332; *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1376 (6th Cir. 1993) ("the Census Bureau's efforts to conduct as accurate a census count as possible are extraordinary"), cert. denied, 114 S. Ct. 1217 (1994).

[4] In January 1993, Barbara Bryant, then the Director of the Census Bureau, estimated that the undercount might be in the range of 0.9% to 1.2%. 58 Fed. Reg. 75 (1993). The Commerce Department now believes, however, that 1.6% is the correct estimate of the undercount. That 1.6% undercount is approximately the same as the undercount in the 1980 census. Pet. App. 58 n.12.

[5] The decision of the Secretary of Commerce estimated that "Blacks appear to have been undercounted in the 1990 census by 4.8%, Hispanics by 5.2%, Asian-Pacific Islanders by 3.1%, and American Indians by 5.0%." Pet. App. 138-139.

b. The problem of the overall undercount and differential undercounts among demographic groups led the Secretary of Commerce to consider a statistical adjustment to the 1980 decennial census. Ultimately, however, no adjustment was undertaken. That decision not to adjust was challenged in a number of lawsuits. None was successful. The action brought by the State of New York resulted in a trial, and the suit was not resolved until 1987. *Cuomo* v. *Baldrige*, 674 F. Supp. 1089, 1104 (S.D.N.Y. 1987).

In the same year that litigation regarding the 1980 census finally concluded, the Department of Commerce announced that no statistical adjustment would be made for the 1990 census. In the following year, plaintiffs filed this suit, seeking to compel an adjustment to the 1990 census for all purposes for which the census is used, including the apportionment of Representatives among the States and the distribution of federal funds. The defendants included the President, the Secretary of Commerce, the Census Bureau and its Director, and the Clerk of the House of Representatives.[6]

In July 1989, the parties entered into a stipulation under which the defendants agreed to reconsider the adjustment question and to reach a decision by July 15, 1991. Defendants also agreed to conduct a post-enumeration survey (PES) of at least 150,000 households in order to generate data on which a statistical adjustment could be based.[7] In accordance with the stip-

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[6] On February 8, 1989, counsel for the Clerk of the House of Representatives entered into a stipulation providing that the Clerk "neither objects nor consents to the relief requested by the plaintiffs in their complaint and takes no position with respect to the questions involved in this litigation." Stipulation Regarding Participation of Defendant Donnald K. Anderson at 1-2. The Clerk agreed to be bound by any judgment entered in the case and accordingly was "relieved of any obligation to answer the complaint or otherwise participate in this litigation." *Id.* at 2.

[7] The PES, which was conducted in July 1990, involved an attempt to identify all individuals living in a sample of more than

ulation, the Secretary of Commerce also adopted eight guidelines that he would consider in deciding whether to order an adjustment of the 1990 census totals. Plaintiffs challenged those guidelines, but the district court sustained them. Pet. App. 96-120.

c. On July 15, 1991, the Secretary of Commerce issued his determination that the census headcount would not be statistically adjusted. Pet. App. 135-415. At the outset, the Secretary explained that the crucial question is not whether an adjustment would improve accuracy in terms of absolute numbers at the national level, but whether adjusted numbers would provide an improved account of the way the population is distributed among the States and their subdivisions. See *id.* at 141, 146-147, 161, 184. He noted that this focus on "distributive" rather than "numeric" accuracy follows from the constitutional purpose of the census, which is to apportion Representatives among the States, and the other uses of the census, including intrastate electoral redistricting and the distribution of federal funds. See *id.* at 141, 184, 200-201. The Secretary also stated that, in accordance with the guidelines, the unadjusted figures would be regarded as the most accurate unless the adjusted numbers were shown to be more accurate. *Id.* at 184.[8]

168,000 housing units across the United States in order to determine whether those persons had been properly counted and located in the census. The Census Bureau placed persons in the PES in one of 1392 categories, called "post-strata," defined by five variables: age, sex, race, location, and home tenure (owner vs. renter); the Census Bureau then calculated the rate at which each post-stratum was accurately counted in the census. Data obtained from the PES were then used to evaluate the accuracy of the original census and, through the use of a complex methodology involving numerous statistical assumptions and models, to generate adjusted population estimates. See Pet. App. 332-346.

[8] Guideline One stated that "[t]he Census shall be considered the most accurate count of the population of the United States, at the national, State and local level, unless an adjusted count is

The Secretary acknowledged that a statistical adjustment would be likely to increase the numeric accuracy of the census. Pet. App. 184-185, 200. He concluded, however, that the adjusted figures had not been shown to increase distributive accuracy, and that in fact "the evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration." *Id.* at 185. In support of his determination, the Secretary analyzed a variety of statistical disputes regarding the accuracy of the proposed adjustment. His decision explained, in considerable detail, that the adjustment process consisted of a series of statistical assumptions, each of which was susceptible to error.[9] The Secretary noted as well that the difficulty of his decision was increased by the "diversity of opinion among [his] advisors." *Id.* at 140. The Secretary noted that "[t]he Special Advisory Panel split evenly as to whether there was convincing evidence that the adjusted counts were more accurate. There was also disagreement among the professionals in the Commerce Department, which includes the Economics and Statistics Administration and the Census Bureau." Pet. App. 140.

The Secretary also analyzed at length the efforts made to estimate the relative accuracy of the adjusted and unadjusted numbers. Pet. App. 185-200. That inquiry focused largely on the Census Bureau's "loss function

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shown to be more accurate." Pet. App. 151. The Secretary explained in his July 15, 1991, decision that "[t]he true population counts cannot be observed. However, classical statistics provides a standard way of approaching the required inference. In accordance with Guideline One, we take as a working (null) hypothesis that the actual enumerations in fact better characterize the true population. The adjusted counts are an alternative measure and the question is whether the available evidence permits us to reject the hypothesis that the census better describes the true population." *Id.* at 184.

[9] For a concise description of the adjustment process, see D. Freedman, *Adjusting the 1990 Census*, 252 Science 1233 (1991).

model," which was developed to measure the "loss" from using the census as compared to the "loss" from using an adjusted count.[10] The Secretary concluded that the loss function analysis involved so many uncertainties that its utility was questionable." *Id.* at 188-192.

In the Secretary's view, however, the analysis tended to show that the adjusted figures were less accurate than the unadjusted count at every level from the state level down. In this regard, the Secretary noted that the Bureau's initial loss function analysis had significantly overstated the distributive accuracy of the adjusted figures at the state and local levels, where the census is actually used for apportionment and funding. See Pet. App. 141. The Secretary pointed out that the original loss function analysis appeared seriously to underestimate the variances, or estimates of sampling error, in the adjusted data. *Id.* at 190-191. The Census Bureau's Undercount Steering Committee had reported that the relevant variances were understated by a factor in the range from 1.7 to 3. *Ibid.*[11] The Secretary concluded that even if the variances were increased only by a factor of 2, a figure at the low end of the Bureau's range, "the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy." *Id.* at

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[10] The loss is the difference between each count and the "true population." Pet. App. 188-189. The "true population" is, of course, unknown. *Ibid.* Indeed, the purpose of an adjustment is to arrive at an estimate of the "true population." To deal with that problem, the Bureau attempted to create a hypothetical "true population" by taking the proposed adjusted figures and attempting to correct them for various "biases" or errors. See *id.* at 186-187. The census and the adjusted counts were then compared to the estimated "true population."

[11] The Undercount Steering Committee expressed that conclusion in an Addendum issued on June 27, 1991—less than three weeks before the Secretary was required, under the stipulation, to announce his decision for or against adjustment. See Pet. App. 190.

191; see *id.* at 74.[12] The record further showed that, even before the variance correction, an adjustment was estimated to worsen the distributive accuracy of 11 of the 23 metropolitan areas in cities with 500,000 or more inhabitants, including the City of New York. *Id.* at 191.[13] The Secretary expressed concern about the still-fluid nature of the Department's analysis of the raw data and about the possibility that additional analysis following a decision to make a statistical adjustment would further erode the basis for such an adjustment. See *id.* at 144.

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[12] Census Bureau research following the Secretary's decision, as presented at trial, confirmed the Secretary's conclusion that the variances were underestimated. Tr. 1914-1915. Based on that research, the Bureau's Chief Mathematician testified at trial that, contrary to his original recommendation to the Secretary, he no longer favored the adjustment proposed for the Secretary's consideration in 1991. Tr. 1920-1921.

[13] Moreover, although the adjustment was in large part proposed to remedy the disproportionate undercount of minorities, the administrative decision explained that the driving force for an adjustment may not have been the undercount at all. The decision noted that "[o]ne would hope that the predominant determinant of the adjustment would be the number of people missed in the census," so that "areas with high miss rates get high adjustments." Pet. App. 173. The decision revealed, however, that the areas with the three highest omission rates in fact had very different adjustment rates. To a large extent, it turned out, the proposed adjustment was driven by attempts to correct for overcounting in certain areas and certain respects. *Ibid.* The administrative decision suggested the lack of a firm basis for finding a direct correlation between a State's percentage of minority residents and how it fares under an adjustment. Thus, the undercount rate for Montana was higher than that of New York. See *id.* at 194. Indeed, despite its relatively large proportion of minorities, New York's share of the population would actually have decreased as a result of the proposed adjustment. See Administrative Record (A.R.), App. 10, Table 5.

The Secretary also emphasized that even very small changes in the assumptions utilized in developing the adjustment methodology would shift seats in the House of Representatives. For example, "[o]ne expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods." Pet. App. 142; see also *id.* at 218. The decision noted as well the gravity of departing from the 200-year practice of relying upon unadjusted figures to apportion Representatives among the States. The Secretary stated that "[d]ecisions that may be nearly equally defensible from a technical standpoint may have very different outcomes which can be known in advance of the decisions," thereby creating the danger of actual or perceived "manipulation of the census for partisan gain." *Id.* at 236-237.

3. Following the Secretary's decision, the district court permitted extensive discovery and then set the case for trial. The trial lasted 13 days, involving numerous witnesses and thousands of pages of exhibits. At the conclusion of the trial, the district court granted judgment for the governmental defendants, using the "arbitrary and capricious" standard of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A). See Pet. App. 65-66.[14] The court examined the Secretary's consideration of each of the guidelines adopted pursuant to the stipulation and

[14] At a prior stage of the litigation, the district court had concluded that "Article I, § 2 requires that the census be as accurate as practicable." Pet. App. 109 (brackets and internal quotation marks omitted). The court adhered to that conclusion in its final ruling. See *id.* at 68. The court made clear, however, that its application of that standard would reflect deference to the Secretary's resolution of disputed technical and policy questions. See *ibid.* (test is "whether the Secretary's decision was arbitrary and capricious in light of the requirement that the decision provide the most accurate census practicable").

concluded that his consideration of each was reasonable. In particular, the court found that "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." *Id.* at 77-78. The district court also explored several of the underlying statistical controversies. Although the court stated in passing that it probably would have ordered an adjustment if it had been called upon to decide the issue de novo (*id.* at 89), it found no basis to set aside the Secretary's determination.

4. On appeal to the Second Circuit, plaintiffs did not contest the district court's determination that the Secretary's decision against adjustment was not arbitrary or capricious. They argued instead that the district court should have analyzed the adjustment issue de novo because the outcome of the decision affected the allocation of seats in the House of Representatives and thus raised constitutional concerns. The court of appeals rejected the argument for de novo review. Pet. App. 23, 34. The court stated, however, that "both the nature of the right and the nature of the affected classes are factors that traditionally require that the government's action be given heightened scrutiny: the right to have one's vote counted equally is fundamental and constitutionally protected, and the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups." *Id.* at 33. The court noted that in "one person-one vote" challenges to intrastate congressional districting plans, a court must first determine "whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Id.* at 36-37 (quoting *Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983)). In that setting, if a court determines that a good-faith effort has not been made, "the State must bear the burden of

proving that each significant variance between districts was necessary to achieve some legitimate goal." *Id.* at 37 (quoting *Karcher*, 462 U.S. at 731).

Applying the same analysis here, the court of appeals concluded that "plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable." Pet. App. 38. The court reached that conclusion by focusing on "the Secretary's acknowledgement" that use of the adjusted population estimates likely would increase the overall *numeric* accuracy of the census at the national level and would reduce the disproportionate undercount of minorities. *Ibid.* The court further stated that the Secretary "gave other factors priority over achievement of greater accuracy" at the national level by, *inter alia*, "valu[ing] 'distributive accuracy' over numerical accuracy." *Ibid.* It also expressed the view that the Secretary's declaration that an adjustment should not be made unless it would result in *greater* distributive accuracy implied that the Secretary did not make the requisite good-faith effort in light of the improved count of the total national population and the improved absolute count of minorities. *Ibid.*; see also *id.* at 38-39.[15]

The court of appeals concluded that

> plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable, and that the burden thus shifted to the Secretary to justify his decision

[15] The court of appeals also noted the Secretary's concern that an adjustment that did not clearly provide a more accurate account of the distribution of the population would introduce fears of political manipulation. The court stated that that concern reflected a belief that "eliminating the possibility of manipulation of statistical surveys in the future was more important than using the admittedly unmanipulated 1990 PES to achieve a more accurate overall count." Pet. App. 38.

> not to adjust the census in a way that the [district] court found would for most purposes be more accurate and would lessen the disproportionate counting of minorities. The Secretary's decision not to make that adjustment is subject to scrutiny not under an arbitrary-and-capricious standard of review but rather under the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity. While precise equality is a goal that at the national level may be illusory, there must be a good-faith effort to approach that goal as nearly as is practicable, and the substantive question becomes what choice should be made among imperfect alternatives. When the official answer is that it is preferable to undercount minorities, that answer must be supported by an official showing that that result (a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective.

Pet. App. 39-40. The court of appeals accordingly vacated the judgment of the district court and remanded the case "for further proceedings not inconsistent with this opinion." *Id.* at 40.

Judge Timbers dissented. He expressed agreement with the decision and reasoning of the district court and noted that the majority's holding was in conflict with the decisions of two other courts of appeals. Pet. App. 40 (citing *City of Detroit* v. *Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994); *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992)).[16]

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[16] The States of Wisconsin and Oklahoma filed petitions for rehearing with suggestions of rehearing en banc. The court of appeals denied both petitions. Pet. App. 416-421.

REASONS FOR GRANTING THE PETITION

In considering whether the 1990 census figures should be statistically adjusted, the Secretary of Commerce received sharply conflicting recommendations from independent advisors and from subordinates within his own Department. The question for this Court is not whether, on balance, the Secretary made the appropriate determination as a matter of statistics or policy, but whether his decision not to make an adjustment was within the range of constitutionally permissible options. As we demonstrate below, it was.

Resolution of the technical and policy disputes bearing on the adjustment determination is substantially entrusted to the Secretary's expert judgment and discretion, and judicial review must reflect appropriate deference to his decision. Such deference is mandated by generally applicable principles of administrative law. It is required as well by the broad delegation of authority expressed in the Constitution itself, which states that the census shall be conducted "in such Manner as [Congress] shall by Law direct," Art. I, § 2, Cl. 3, and in the Census Act, which authorizes the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. 141(a). And it is required by the compelling interest in the finality of the President's apportionment of Representatives among the States in January 1991, which was based on the unadjusted census data.

Secretary Mosbacher's July 15, 1991, decision against adjustment of the 1990 census figures was reasonable and consistent with applicable constitutional standards. We agree with the court of appeals that the Constitution and the Census Act do not bar a statistical adjustment of census data. See Pet. App. 23-26; 13 U.S.C. 141 (decennial census), 181 (intercensal population data). And our disagreement with the court of appeals, we emphasize, does not concern the need for census procedures

that are free from racial discrimination. Credible evidence that either the enumeration of the population or the decision against adjustment was tainted by a discriminatory motive would raise grave constitutional concerns. There was, however, no such showing here. Moreover, the court of appeals' analysis reflects a fundamental misunderstanding both of the bases for the Secretary's decision and of the governing constitutional principles. For that reason—and because two other courts of appeals, in contrast to the court below, have rejected constitutional challenges to Secretary Mosbacher's decision not to adjust the 1990 census figures—review by this Court is warranted.

1. The Secretary's decision not to undertake an adjustment of the 1990 census figures rested primarily on three determinations. First, the Secretary concluded that distributive rather than total numeric accuracy should be of paramount importance in deciding whether to make an adjustment. Second, the Secretary determined that the unadjusted census figures would "be considered the most accurate count of the population of the United States, at the national, State, and local level, unless an adjusted count is shown to be more accurate." Pet. App. 151. Finally, the Secretary concluded that the adjusted figures had not been shown to improve distributive accuracy and that adjustment was therefore not warranted.[17]

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[17] Pursuant to the stipulation and guidelines, see pages 5-6, *supra*, the Secretary's 1991 decision also discussed in detail several other factors bearing on the decision not to adjust. We believe that the Secretary's consideration of those factors was "consonant with, though not dictated by, the text and history of the Constitution." *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2778 (1992). However, disputes concerning the propriety of those aspects of the Secretary's decision are not central to this case for present purposes. Although the Secretary believed that such factors as encouraging participation in future censuses and the fear of actual or perceived political manipulation lent further support to the decision against adjustment, he stated unequivocally that the adjusted figures had not been shown to improve the accuracy of the census in the relevant

The first two determinations are policy decisions that a court may review "to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation." *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777 (1992).[18] The third is an exercise of technical judgment that is properly reviewable, if at all, only under a deferential "arbitrary and capricious" standard. Each of the three determinations easily withstands judicial scrutiny.

a. As the district court recognized, "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." Pet. App. 77-78. The constitutional purpose of the census is to determine the apportionment of Representatives among the States, U.S. Const. Art. I, § 2, Cl. 3, which is to be based on their "respective numbers, counting the whole number of persons in each State." Amend. XIV, § 2. Even a dramatic undercounting of the population would not threaten the goal of fair apportionment so long as each State's share of the total population was accurately determined. Conversely, a precise estimation of the nation's total population is of no value in the apportionment

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(*i.e.*, distributive) sense. Moreover, such factors as concerns about future participation and actual or perceived political manipulation are not irrelevant to the overall, long-term accuracy of the census. Cf. *Baldrige* v. *Shapiro*, 455 U.S. 345, 353-354 & n.8, 361 & n.17 (1982).

[18] Respondents have not contended that the text of the Constitution compels the Secretary to employ adjusted figures or reflects a preference for that result. Their contention instead has been that use of a statistical adjustment is necessary to further the constitutional goal of equal representation.

process if the States' respective shares of that population are inaccurately estimated. Thus, the Secretary's focus on distributive rather than numeric accuracy was "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S. Ct. at 2777. Indeed, in the court of appeals, plaintiffs specifically stated that they "agree (as do, for that matter, all experts on either side of the adjustment question) that it is distributive accuracy that is of paramount importance for the constitutional and legal purposes for which the census is conducted." Pltfs' C.A. Reply Br. 14 n.4.

b. Similarly, the Secretary's determination that unadjusted figures would be considered the most accurate absent a contrary showing was a judgment "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 112 S. Ct. at 2778. In light of the 200-year practice of relying on unadjusted figures, it was surely permissible to conclude that those figures should be treated as the most accurate unless alternative numbers were shown to be better. Cf. *id.* at 2777-2778 (noting importance of historical practice); *id.* at 2785 (Stevens, J., concurring in part and concurring in the judgment) ("The 'usual residence' policy that has guided the census since 1790 provides a further standard by which to evaluate the Secretary's exercise of discretion."). Nor could "the constitutional goal of equal representation," *id.* at 2777, plausibly be thought to require the Secretary to use adjusted figures that he has not found to be more accurate than the unadjusted numbers. In any event, the Secretary did not simply determine that proponents of adjustment had failed to prove the greater distributive accuracy of adjusted figures. Rather, he affirmatively concluded that "the evidence provided by the Census

Bureau tends to support the superior distributive accuracy of the actual enumeration." Pet. App. 185.[19]

c. The district court held that the Secretary "was neither arbitrary nor capricious" in concluding that the superior distributive accuracy of the adjusted figures had not been demonstrated. Pet. App. 77. That holding was correct. As Census Director Bryant observed in her recommendation to the Secretary in favor of an adjustment, "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." *Id.* at 59. The Secretary engaged in exhaustive analysis of the pertinent evidence, however, and his resolution of disputed technical questions is reviewable only under an extremely deferential standard. See *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 377-378 (1989) (where "analysis of the relevant documents requires a high level of technical ex-

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[19] The court of appeals suggested in-passing that the Secretary regarded the adjusted and unadjusted numbers as equally accurate (see Pet. App. 38) and asserted that the adjusted figures would improve accuracy for the areas in which up to two-thirds of the population resided (see *id.* at 39). Those characterizations of the record reflect a basic misreading of the Secretary's decision and the evidence at trial. The two-thirds figure was an original estimate provided by the Census Bureau using its "loss function model." The Secretary's decision explained in considerable detail that the loss function model had failed to take into account variances that the Undercount Steering Committee subsequently reported to be significantly understated. See *id.* at 185-192. As the district court explained, "when the Secretary employed a statistical variance toward the low end of the acceptable range envisioned by the [Undercount Steering Committee], he found that the proportional shares of 28 or 29 states would be worsened by adjustment." *Id.* at 74. As noted above, subsequent research by the Census Bureau and further evidence presented at trial demonstrated that the original loss function analysis substantially overstated the accuracy of the adjusted data. See pages 7-9 & note 12, *supra*. The court of appeals' reliance on data that the Secretary had specifically corrected underscores the error of its analysis.

pertise, [courts] must defer to the informed discretion of the responsible federal agencies") (internal quotation marks omitted); see also *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2387 (1994); *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).[20] The Secretary's deci-

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[20] Two courts of appeals have concluded, in rejecting constitutional challenges to the Secretary's decision against adjustment, that the Apportionment Clause "does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology" because such a lawsuit "invokes no judicially administrable standards." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992); accord *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1375-1378 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994). On the other hand, it might plausibly be argued that, in light of "the constitutional goal of equal representation," *Franklin*, 112 S. Ct. at 2777, the Secretary's use of an irrational statistical methodology that affects the apportionment of Representatives among the States is subject to judicial scrutiny. Cf. *id.* at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment).

There is no basis, however, for respondents' contention in the court of appeals that the central statistical issue in this case—whether use of the adjusted figures would have improved the distributive accuracy of the census—should have been resolved by the district court de novo on the ground that the case involves a constitutional claim. Although issues pertaining to the accuracy of the census implicate constitutional values, resolution of the statistical dispute in this case does not involve the interpretation of a constitutional text. Rather, it involves an exercise of technical expertise to which judicial deference is required. Such deference is especially appropriate as a constitutional matter in light of the broad discretion vested in Congress by the Apportionment Clause's provision that the census be conducted "in such Manner as [Congress] shall by Law direct," Art. I, § 2, Cl. 3; see *Baldrige*, 455 U.S. at 361, and by the broad delegation of authority by Congress contained in the Census Act, see 13 U.S.C. 141(a) (Secretary shall conduct the decennial census "in such form and content as he may determine"). Finally, de novo resolution by the district courts of the question whether an adjustment would increase distributive accuracy would create the possibility of inconsistent findings by

sion, based on that analysis, was within the range of constitutionally permissible choices. That is especially so in light of (1) the need for the Secretary to make a decision by the July 15, 1991, deadline (to which respondents stipulated in the district court and which they did not challenge below), and (2) the Secretary's determination that the state of the administrative record and the various expert evaluations of it were not at that time sufficiently settled to permit him to make a decision in favor of adjustment with the degree of confidence he believed was appropriate for such a significant departure from past practice. See Pet. App. 140-141, 144.

2. The court of appeals regarded the Secretary's 1991 decision against adjustment of the 1990 decennial census as analogous to a State's decision to create congressional districts of unequal size. Under this Court's precedents, a demonstration that disparities in the size of congressional districts within a State are "not the product of a good-faith effort to achieve population equality means * * * that the burden shift[s] to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." *Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983). In the present case, the court of appeals concluded that "plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable," and that "the burden thus shifted to the Secretary to justify his decision not to adjust the census in a way that the [district] court found would for most purposes be more accurate and would lessen the disproportionate counting of minorities." Pet. App. 39.

The court of appeals thus treated the Secretary's decision as suspect on the basis of (a) the Secretary's acknowledgment that an adjustment would probably im-

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courts in different jurisdictions—each reviewable on appeal only under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-576 (1985).

prove total numeric accuracy at the national level, (b) a purported district court finding that the adjusted figures "would for most purposes be more accurate," Pet. App. 39, and (c) the uncontested fact that the undercount of racial minorities was greater than the undercount of nonminority residents. The court of appeals' analysis does not withstand scrutiny.

a. Any effort to ensure that congressional districts in different States are precisely equal in population "is constrained by three requirements. The number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines." *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 447-448 (1992). Within those constraints, responsibility for implementation of the constitutional goal of equal representation lies both with Congress (which must apportion Representatives among the States "according to their respective Numbers," Art. I, § 2, Cl. 3; Amend. XIV, § 2) and with the States themselves (which are required, in conducting intrastate districting, to create districts of essentially equal size).

The judicial roles in the two contexts are, however, quite distinct. This Court has held that Congress's "apparently good-faith choice of a method of apportionment of Representatives among the several States 'according to their respective Numbers' commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. The Secretary's statistical and policy judgments in the conduct of the census are entitled to at least as much deference as Congress's selection of a method for apportioning Representatives on the basis of census data. That is so because Congress, in the exercise of its broad "discretion" regarding the census, *Baldrige*, 455 U.S. at 361, has directed the Secretary to conduct the decennial census "in

such form and content as he may determine," 13 U.S.C. 141(a), and because the constitutional text and purposes furnish even less guidance with respect to the manner and details of enumerating the population in the first place than they do with respect to the apportionment of Representatives among the States on the basis of that enumeration.

The court of appeals failed to accord the requisite deference to the Secretary's judgment. Indeed, it entirely failed to explain how the goal of equal representation for equal numbers of people in the several States could be better served by focusing on the total *numeric* accuracy of the census figures at the national level. Numeric accuracy does not answer the critical question for adjustment purposes, namely, whether the States' respective shares of the total population would be more accurately determined. Distributive accuracy does. As the district court recognized, "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." Pet. App. 77-78.

The court of appeals nonetheless concluded that "the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable," and that the Secretary's failure to maximize numeric accuracy gave rise to a burden of explanation akin to that imposed upon a State that intentionally creates legislative districts of unequal size. Pet. App. 39-40. The two situations, however, are very different. Unlike in cases involving the drawing of legislative districts within a State on the basis of a given set of data, the myriad policy and statistical judgments required in assembling, evaluating, and deciding whether (or how) to adjust those data in the first place are not "capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S.

at 464. Moreover, in light of the varying measures of accuracy and equity and the competing claims of the States in the apportionment of Representatives—as well as the Constitution's plenary grants of authority to Congress in the Apportionment Clause and the Necessary and Proper Clause, Art. I, § 8, Cl. 18—the Secretary's "apparently good-faith choice of a method" for determining the respective populations of the States, pursuant to broad discretionary authority conferred on him by Congress, "commands far more deference than a state districting decision." *Montana*, 503 U.S. at 464.

b. The district court stated (without explaining precisely what it meant) that it was "satisfied that for most purposes the [post-enumeration survey (PES)] resulted in a more accurate—or to be statistically fashionable, a less inaccurate—count than the original census." Pet. App. 59. The court also stated (without substantial explanation) that "were this Court called upon to decide this issue *de novo*, I would probably have ordered the adjustment." *Id.* at 89. The district court did not, however, set aside the Secretary's determination that the distributive accuracy of the census would not have been improved by an adjustment. There is consequently no basis for the court of appeals' statement (*id.* at 38) that "the findings of the district court * * * plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable."

c. The court of appeals also referred repeatedly to the disproportionate undercount of racial minorities (see, *e.g.*, Pet. App. 33, 38, 39, 40), invoking that differential as a basis for its conclusion that the Secretary's decision not to adjust should be reviewed "under the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity." *Id.* at 39-40. The court of appeals was simply

wrong, however, in asserting that "[e]qual protection analysis requires that heightened scrutiny be given to the Secretary's decision to adhere to an acknowledged undercount that concededly impacts minority groups more severely than nonminority groups." Pet. App. 34. To the contrary, establishment of an equal protection violation based upon racial discrimination requires proof of a discriminatory *purpose*. *Washington* v. *Davis*, 426 U.S. 229, 239-245 (1976). The intentional undercounting of racial minorities in the conduct of the census (and in the resulting apportionment of Representatives) would be a matter of grave concern to the integrity of our democratic process. The courts would be open to consider such claims under the analytical framework followed in *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and its progeny, and to afford relief where appropriate, see *Franklin*, 112 S. Ct. at 2776-2777 (opinion of O'Connor, J.).

In this case, however, neither the court of appeals nor the district court found that either the Secretary or other federal officials acted for the purpose of reducing the electoral power of (or otherwise disadvantaging) minority residents. Nor do the evidentiary considerations identified in *Arlington Heights* suggest a basis for such a claim. The Secretary's decision against adjustment was fully in keeping with historical practice, a fact that suggests a lack of discriminatory intent. Compare *Arlington Heights*, 429 U.S. at 267 & n.16 (abrupt departures from prior policy in ways that disadvantage minorities may constitute evidence of discriminatory motivation); *id.* at 270 (defendant "has applied [its] policy too consistently for [the Court] to infer discriminatory purpose from its application in this case").[21] Secretary Mosbacher's extensive explana-

[21] The Court in *Arlington Heights* also observed that "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." 429 U.S. at

tion published in the *Federal Register* sets out a host of race-neutral reasons for his decision not to adjust. Compare *id.* at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."). And the government's extraordinary efforts to enumerate minority residents [22] and to identify persons who initially failed to return questionnaires also belie any inference that Census officials pursued a deliberate policy of undercounting minority residents.[23]

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267. In the present case, the Secretary departed from customary procedures only by devoting enhanced consideration to the possibility of a statistical adjustment and explaining his ultimate decision in greater detail.

[22] In her recommendation to Secretary Mosbacher, Census Director Bryant stated (DX 1, at 1121-1122):

> For the 1990 census, the Census Bureau mounted the most extensive effort ever to enumerate Blacks and other minorities. This included the hiring of 280 community outreach workers who worked in communities two years before census taking; involvement of 56,000 community organizations—mostly minority but also city and state Complete Count Committees; outstanding cooperation from Black and Spanish language media in running public service announcements and programs about the importance of the census; and the hiring of follow-up enumerators from minority populations, bilingual and multilanguage enumerators, and residents of public housing projects and American Indian reservations to enumerate persons in their neighborhoods. Despite this effort, the undercount differential was not reduced below its historical level.

[23] "The Census Bureau followed up every housing unit for which a questionnaire was not returned," Pet. App. 327; its nonresponse follow-up policy required Bureau enumerators "to make up to six attempts to contact a household member and complete a census questionnaire," *id.* at 328. The Bureau also developed special procedures directed at individuals—such as residents of group quarters, transients, military personnel, homeless persons, and parolees and probationers—who the Bureau believed were particularly likely to be missed. See *id.* at 326, 330-331. The Bureau's "Were You

A disparate impact upon racial minorities, though not itself sufficient to establish a constitutional violation, may sometimes furnish evidence of discriminatory purpose. See *Arlington Heights*, 429 U.S. at 265-266; *Davis*, 426 U.S. at 242. In the present case, it is undisputed that racial minorities were disproportionately undercounted in the 1990 census. But neither the Secretary nor the district court found (and plaintiffs did not show) that a failure to adjust the census totals would in turn have a disparate racial impact with respect to the proper allocation of Representatives among the States, the only constitutionally prescribed use of census data. There likewise was no such finding with respect to either the proper distribution of federal funds or the accurate drawing of congressional or legislative districts (a matter that is in any event the responsibility of the States, not the federal government). Indeed, as we have noted above (see pages 7-9, *supra*), Secretary Mosbacher concluded that he could not confidently determine that an adjustment would improve the distributive accuracy of the census even as a general matter. In light of the substantial evidence of legitimate nonracial reasons for the Secretary's decision against adjustment, a disparate racial impact at the numeric level is clearly insufficient to establish a constitutional violation.

3. The court of appeals' decision warrants review by this Court.

a. As the dissenting judge in the court of appeals observed (Pet. App. 40), the Sixth and Seventh Circuits have rejected constitutional challenges to the Secretary's determination that the 1990 census figures should not be

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Counted?" campaign provided individuals who believed that they had been missed with an additional opportunity for inclusion in the census. *Id.* at 330. Finally, units of local government were permitted to challenge the housing unit or group quarters count for any block; each of the country's 51 largest cities challenged at least some blocks, and eight cities challenged over 2000 blocks. *Id.* at 332.

statistically adjusted. Thus, the court in *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992), concluded that "merely by directing congressional apportionment in accordance with the decennial census, Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." The Sixth Circuit relied on *Tucker* in concluding that "[t]he plaintiffs' claim to a census adjustment invokes no judicially administrable standards" because adjudication of the claim would require the court "to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to a census headcount." *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1378 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994) (quoting *Tucker*, 958 F.2d at 1418). Moreover, this case is one of substantial national importance because of the possibility that the litigation could culminate in an order to reapportion the House of Representatives (and the Electoral College),[24] or in a judicially imposed requirement that the 1990 census data be adjusted in a manner that would result in a redistribution of federal funds among the States.[25]

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[24] We do not suggest that an actual reapportionment of Representatives (and presidential Electors) would be an appropriate remedy at this late date (halfway through the decade governed by the 1990 decennial census) even if the district court were to conclude on remand that, under the court of appeals' analysis, Secretary Mosbacher committed an error of constitutional dimension in 1991 in deciding not to make a statistical adjustment to the 1990 census.

[25] Guideline Three required that the adjusted figures be derived through "pre-specified" procedures. See Pet. App. 213-214, 215-217. As the Secretary explained in announcing the guidelines, "[t]his guideline specifie[d] that a set of procedures for generating proposed adjusted counts [would] be determined in advance of receiving the 1990 post-enumeration-survey estimates." 55 Fed. Reg. 9841 (1990). Thus, while the Secretary recognized the existence

b. The court of appeals in this case did not squarely hold that the Secretary's decision against adjustment violated the Constitution. Rather, it remanded the case to the district court for a determination whether the Secretary's decision "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." Pet. App. 40. Although the interlocutory posture of the case might in other circumstances weigh against review by this Court, we believe that under the unusual circumstances now presented, review is warranted at this stage of the proceedings.

i. If the Court denies certiorari now and further proceedings must commence in the district court under the

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of a variety of defensible adjustment methodologies, see page 10, *supra*, the Secretary was ultimately presented with a choice between the unadjusted census and a single set of adjusted figures. If Secretary Mosbacher had authorized the particular adjustment proposed for his consideration in July 1991, and those adjusted figures had been made the basis for a reapportionment of Representatives among the States, the result would have been a loss of one Representative each for Wisconsin and Pennsylvania and a gain of one Representative each for California and Arizona. See Pet. App. 17, 250-251.

The large majority of the plaintiffs in this case, however, are States other than Arizona or California, or municipalities or residents of States other than Arizona or California. Although many of those plaintiffs may have suffered injury-in-fact due to the impact of the Secretary's decision upon the distribution of federal funds, cf. *City of Detroit*, 4 F.3d at 1374-1375, there is a substantial question whether plaintiffs outside Arizona and California may contest the allocation of Representatives among the States or invoke a heightened standard of review based upon the purported effect of the Secretary's decision upon the right to vote. See *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720 (1990) ("Ordinarily, of course, a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (internal quotation marks omitted); cf. *Franklin*, 112 S. Ct. at 2776 (plurality opinion) (Massachusetts lacked standing to challenge accuracy of census data absent allegation that it would have been allocated an additional Representative if different data had been used).

Second Circuit's erroneous analysis (subject to further review in the court of appeals and this Court), this case may well remain unresolved at or near the time of the 1996 presidential and congressional elections. That uncertainty could be avoided if this Court grants review at this time. Compare *Montana*, 503 U.S. at 445 (Court ordered expedited briefing and argument "[i]n view of the importance of the issue and its significance in [1992] congressional and Presidential elections").

ii. No further proceedings in the lower courts are needed to clarify the issues presented or to render the case suitable for resolution by this Court. As explained above, the Secretary's decision against adjustment was based upon his determinations that (1) distributive rather than numeric accuracy was of paramount importance, (2) the unadjusted figures would be treated as the most accurate unless adjusted numbers were shown to be better, and (3) the proposed adjustment had not been shown to improve distributive accuracy. No extensive factual record is needed for this Court to decide whether the first two determinations were "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 112 S. Ct. at 2777, and the district court has already concluded, based on a careful analysis of the administrative record and on testimony and exhibits introduced during a lengthy trial, that the third determination was not arbitrary or capricious. Respondents did not challenge the latter conclusion on appeal, and nothing in the Second Circuit's decision calls it into question. Given the terms of the court of appeals' remand, further proceedings in the district court are unlikely to assist this Court in its review of the relevant issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-1614 (5)
STATE OF WISCONSIN, Petitioner
v.
CITY OF NEW YORK, et al., Respondents.

No. 94-1631 (4)
STATE OF OKLAHOMA, Petitioner
v.
CITY OF NEW YORK, et al., Respondents.

No. 94-1985 (3)
UNITED STATES DEPARTMENT OF COMMERCE, et al., Petitioners
v.
CITY OF NEW YORK, et al., Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTER-STATEMENT OF QUESTION PRESENTED

After determining that plaintiffs had proved by conclusive evidence that (a) adjusted census data prepared by the Bureau of the Census would increase the accuracy of the census and (b) the decision of the Secretary of Commerce rejecting use of those data did not reflect a good-faith effort to render a census as accurate as practicable, the court of appeals remanded the case to the district court to give the Secretary an opportunity to show that his decision against adjustment was essential to achievement of a legitimate governmental objective. The question presented is whether this Court should grant interlocutory review of the court of appeals' order before the factual record is complete, before either court below has determined the Secretary's decision to be unconstitutional and before either court has considered an appropriate remedy.

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CONSTITUTION AND STATUTE

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Amend. 14 . . . . . 50 n.8

Statute:

Administrative Procedure Act,
5 U.S.C. § 706(2)(A) 24, 34, 56 n.12

MISCELLANEOUS

M. Anderson, The American Census:
A Social History (1988) 7 n.2

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-1614
STATE OF WISCONSIN, Petitioner
v.
CITY OF NEW YORK, et al., Respondents.

No. 94-1631
STATE OF OKLAHOMA, Petitioner
v.
CITY OF NEW YORK, et al., Respondents.

No. 94-1985
UNITED STATES DEPARTMENT OF COMMERCE, et al., Petitioners
v.
CITY OF NEW YORK, et al., Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents the City of New York, the State of New York, the State of Texas, the City of Los Angeles, the City of San Francisco, the City of San Jose, the City of

Tucson, the City of Long Beach, the City of Pasadena, the City of Inglewood, the County of Los Angeles, the County of Broward and the Navajo Nation respectfully request that the petitions for writs of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in Nos. 94-1614, 94-1631 and 94-1985[1] be denied.

Preliminary Statement

The 1990 decennial census, as reported by the United States Department of Commerce ("Department"), reflected an undercount of the national population. Not all

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[1] The petition in No. 94-1614, State of Wisconsin v. City of New York, et al. ("Wisc. Pet."), was filed by the State of Wisconsin on April 3, 1995. The petition in No. 94-1631, State of Oklahoma v. City of New York, et al. ("Okla. Pet."), was filed by the State of Oklahoma on April 4, 1995. The petition in No. 94-1985, United States Department of Commerce, et al. v. City of New York, et al. ("U.S. Pet."), was filed by the United States on June 5, 1995. Upon application, the Clerk of the Court on April 24, 1995 extended the time of respondents to file a brief in opposition to all petitions to and including May 31, 1995 and, upon further application, on June 1, 1995 extended that time to and including July 3, 1995.

areas or groups of Americans were equally affected: as in previous censuses, the undercount was differentially severe among members of racial and ethnic minorities.

Having anticipated, based on its experience with previous censuses, that a differential undercount would occur in the 1990 census and recognizing that a differential undercount undermines the accuracy of census data when used to allocate political representation or government funds, the Bureau of the Census ("Bureau") designed and executed, as part of the 1990 census, procedures that would have permitted a statistical adjustment of the census to correct for the differential undercount. The Bureau prepared and reviewed adjusted census data that, in the Bureau's analysis, ameliorated the differential undercount.

In June 1991 the Bureau concluded that the adjusted census data were more accurate than the unadjusted counts, and the Director of the Bureau recommended to the

Secretary of Commerce ("Secretary") that the 1990 census be adjusted on the basis of the data the Bureau had prepared. In July 1991 the Secretary issued a formal decision rejecting the recommendation of the Bureau's director that the census be adjusted, as well as the Bureau's expert judgment that the adjusted data had been shown to be more accurate.

Plaintiffs challenged the Secretary's decision, alleging that, as the Bureau had concluded, the adjusted data had been clearly shown to be more accurate, that the Secretary's contrary determination had not been made in good faith, and that as a consequence residents of adversely affected jurisdictions were being denied the political representation to which they were entitled, a claim of constitutional dimension. After extensive discovery and a 13-day trial, the district court found that plaintiffs had shown the adjusted data to be more accurate; but, having

concluded that it was empowered to conduct only a limited review of the Secretary's decision, the court entered judgment for defendants because the Secretary's decision was not "so beyond the pale of reason as to be arbitrary or capricious."

On appeal, plaintiffs argued that, in light of the constitutional claim presented, the district court should have reviewed the Secretary's decision de novo. The court of appeals rejected that argument. But, following the teachings of this Court on the standard of review for governmental decisions determining the allocation of political representation and the conduct of the census, the court of appeals concluded that the Secretary's decision should have been subject to a higher level of scrutiny than that applied by the district court. Upon plaintiffs' showing that the adjusted census data were more accurate and that the Secretary's decision against adjustment was not made in

good faith, the court of appeals held, the burden of proof shifted to the Secretary to show that use of the unadjusted count as the census was essential to the achievement of a legitimate governmental objective. The court of appeals vacated the judgment of the district court and remanded for further proceedings.

Petitioners now seek review of that interlocutory order. The petitions fail, however, to show the existence of such unusual circumstances as would warrant issuance of writs of certiorari before final judgment. The decision of the court of appeals is a straightforward application of well-established precedent from this Court. Nor is the court of appeals' decision in conflict with the decisions of two courts of appeals that, on quite different facts, rejected cases seeking to compel other adjustments of the census.

STATEMENT OF THE CASE

a. Error in the unadjusted census. Inevitably, the decennial census is subject to considerable error.[2] Appendix to Petition for Writ of Certiorari in No. 94-1614 ("Pet. App."), at 46; see also Transcript of Trial ("Tr."), at 80-88. For the 1990 census the Bureau has estimated that the unadjusted census counts reflect 25 million, and perhaps as many as 32 million, errors involving erroneous inclusion or exclusion of persons: persons counted who should not have been or counted two or more times ("erroneous enumerations") and persons not included who should have been ("gross omissions"). Pet. App. 259; see also Tr. 83-84. For any given block, the census count is

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[2] For a historical account of census-taking in the United States, including efforts to deal with census error, see M. Anderson, The American Census: A Social History (1988). For a summary of recent research and planning for 2000, see National Research Council, Modernizing the U.S. Census (1995).

not, and is not meant to be, especially reliable. Tr. 1315-1316.

"Net undercount" in the census is the difference between gross omissions and erroneous enumerations. Pet. App. 49, 261; Tr. 89-92. Where net undercount is differentially distributed geographically, it systematically compromises the accuracy of census data for allocating electoral representation and funding. The most serious systematic error affecting the decennial census is the differential undercounting of members of minority groups. Pet. App. 49-50. For the 1990 census, the undercount rate for blacks was 4.8%, for Hispanics 5.2%, for Asian/Pacific Islanders 3.1% and for American Indians 5.0%. Pet. App. 50. On any estimate of the net national undercount, those rates significantly exceed the average undercount rate for the American population. Taking the Department's current estimate, the undercount rate for blacks was three times the

national average, undercount rates for Hispanics and American Islanders were even worse, and the undercount rate for Asian/Pacific Islanders was nearly twice that of the nation as a whole. Because members of minority groups are not evenly distributed geographically, the consequence of the differential undercount is that areas in which members of minority groups are concentrated are systematically deprived of political representation and funding they would otherwise have received. Pet. App. 46, 50; Tr. 92, 1197-1198.

b. Development of the Post-Enumeration Survey. The problem of differential undercount in the 1990 census was neither new nor unexpected. By the 1950's, the Bureau and academic researchers had developed reliable techniques of demographic analysis (monitoring national population change through records of births, deaths, immigration and emigration) and were able to confirm

differential undercounts of blacks in the 1940 and 1950 decennial censuses. Pet. App. 39, 49-50; Tr. 496, 506. By the 1960 census, additional population research advances allowed the Bureau to begin to evaluate the census's deficiencies through "dual-system estimation " Pet. App. 7. To simplify, dual-system estimation involves the use of a second survey to assess the completeness of an original count: a sample is drawn from the population to have been counted, the percentage of the sample actually counted is determined and an estimate of undercount is made on the basis of the portion of the sample found not to have been reached. Pet. App. 51; Tr. 506-507. Dual-system estimation checks were incorporated into the 1960 and 1970 census processes; along with demographic analysis at the national level, the Bureau's dual-system estimation confirmed the persistence of differential undercounting. Pet. App. 52. In 1980 the Bureau designed and executed

the "Post-Enumeration Program" ("PEP"), a more ambitious version of the evaluative procedures that had been used to measure undercount in the previous two decennial censuses. Pet. App. 50 n.3. The PEP, like demographic analysis, showed another severely differential undercount in the 1980 census. Pet. App. 50.

Bureau personnel were troubled by the persistence of the differential undercount. To them, as to outside researchers, it had become plain that no combination of "outreach" programs and energetic canvassing would alleviate the problem. Tr. 506, 1291-1292. By 1984 the Bureau had embarked on a systematic research program to develop a more sophisticated dual-system estimation technique that would be usable not only to evaluate the extent of census coverage deficiencies but to correct them and thereby improve the accuracy of the count. Tr. 516-521. The technique, based upon improvements in the 1980

PEP, was named the "Post-Enumeration Survey" ("PES"). Tr. 1297. In congressional testimony and appearances before professional organizations in 1986 the Bureau's senior staff reported on the successes of their developing design; simultaneously, test censuses allowed the Bureau to ascertain that individual components of the PES, and the PES overall, functioned as intended. Pet. App. 50-53; Tr. 621-622, 1298-1301, 1307-1308.

c. Commencement of this litigation. Development of the PES as a technique for adjustment was retarded, however, in 1987, when the Department of Commerce intervened and announced in a press release that the 1990 census would not be statistically corrected. Pet. App. 52-53; Tr. 1326. The Department's press release was never supplemented by any formal presentation of the reasons underlying it: in broad terms, without reference to the differential undercount, the Department stated merely

that the 1990 count was expected to reach 99% of the national population. Tr. 1327-1332. The PES would still be conducted, but its sampling design would not be specifically calibrated for use in adjustment and further development of adjustment techniques would be suspended.

In November 1988 the first of the three consolidated lawsuits giving rise to the petitions was filed, City of New York, et al. v. United States Department of Commerce, et al., in the United States District Court for the Eastern District of New York. A broad coalition of state, county, city, organizational and individual plaintiffs alleged that the decision to leave the 1990 census unadjusted would predictably result in a differential undercount of members of minority groups.[3] Plaintiffs moved for a preliminary

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[3] Two other cases, initiated in 1992 in other jurisdictions, were later transferred to the United States District Court for the Eastern District of New York and consolidated with the earlier-filed action. Pet. App. 61 n.14.

injunction to ensure that, pending the outcome of the litigation, the PES would be conducted in a manner that would permit its use for adjustment.

On July 17, 1989, the day scheduled for commencement of a hearing on the motion for a preliminary injunction, defendants agreed to a stipulation under which, inter alia, the decision against adjustment was vacated and the PES restored to a size (ultimately involving a sample of approximately 400,000 Americans) that would make it usable for adjustment. Defendants also agreed to reconsider the question of adjustment with an open mind and without prejudgment, to publish guidelines that would articulate the considerations they intended to apply in deciding whether to adjust, to release uncorrected census results (if at all) only with a cautionary indication to recipients that the numbers were subject to adjustment to correct for undercounting and to appoint a special advisory panel comprising eight

members, four of whom would be selected by the Secretary from a list of seven to be proposed by plaintiffs and four of whom would be selected independently by the Secretary. Pet. App. 96-120.

In the spring of 1990 defendants promulgated guidelines in purported compliance with the 1989 stipulation. Plaintiffs challenged the guidelines on the grounds that they reflected an impermissible bias in favor of the unadjusted count, that they reflected an intention to predicate the adjustment decision on factors other than accuracy and that they failed to set forth the technical considerations (as opposed to generalized statements of policies) that defendants would weigh in their decision. The district court upheld the guidelines. Pet. App. 96-120. Limiting itself to consideration of whether the guidelines satisfied the 1989 stipulation -- i.e., forgoing consideration of whether the guidelines satisfied constitutional

requirements -- the court found that, although "[d]efendants [had] done the bare minimum" and "the issue [was] indeed close, defendants [had] satisfied their obligations thus far." Pet. App. 116.

Both the 1990 census and the PES, conducted as part of the census, took place as scheduled. As anticipated, and as discussed above, the uncorrected census was affected by a severely differential undercount.

The Bureau determined that the differential undercount in the uncorrected census could be substantially ameliorated through adjustment. Pet. App. 59. The Bureau's director, Barbara E. Bryant, formally recommended to Secretary Robert A. Mosbacher that the 1990 census be adjusted. Pet. App. 59.

d. The Secretary's decision. Secretary Mosbacher rejected that recommendation. At the outset of his decision, he acknowledged the net undercount and the

severely differential undercount in the uncorrected census. Pet. App. 138-139. The Secretary acknowledged too that the Bureau had found that adjustment would improve distributive accuracy for places containing two-thirds of the national population. Pet. App. 141-142. He conceded that "the PES was a generally high-quality survey that was well-executed" and that "[t]here is little doubt that the PES detected an overall undercount in the census and a differential undercount at the national level by race and ethnic origin." Pet. App. 169. Nonetheless, the Secretary decided against adjusting the census to correct for the differential undercount.

Proceedings Below

1. On Secretary Mosbacher's announcement of his decision, plaintiffs challenged his refusal to accept the recommended adjustment. In May 1992, after extensive discovery, the district court presided over a 13-day trial, at

which testimony was offered from 14 statisticians and demographers. Pet. App. 61.

The evidence at trial demonstrated that the Bureau's own research, which formed the basis for its director's recommendation in favor of adjustment, showed that the adjusted counts provided superior distributive (as well as numeric) accuracy. Plaintiffs demonstrated (and the point has not been contested by respondents) that adjustment would alleviate the differential undercount of minorities, improving distributive accuracy for demographic groups' shares of the population. Pet. App. 94-95; Tr. 1197-1198.

The basis for the Bureau's conclusion, and thus the heart of plaintiffs' case, included comparison of the adjusted and unadjusted data with demographic analysis, Tr. 883-895; evaluation of potential sources of error in the PES, Tr. 250-251, 646-648, 1500-1502; confirmation that patterns of undercount described by the PES corresponded

with Bureau experts' expectations, based upon decades of study of the problem of differential undercount, Tr. 645, 1543-1547; and systematic comparison of errors in the adjusted and unadjusted counts ("loss function analysis"), Tr. 596-601, 925-970.[4]

The Bureau's analyses showed that adjustment would dramatically increase the accuracy of the census. Tr. 935-970. The analyses proved that adjustment would increase numeric accuracy, of course, but, more important, they showed dramatic increases in distributive accuracy in terms of the apportionment of the House of Representatives, demographic groups as shares of the national population, states as proportions of the nation, components of states as proportions of their respective states and areas of the nation

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[4] For a general discussion of the application of loss function analysis to the decision whether to adjust the census, see C. Citro & M. Cohen (eds.), The Bicentennial Census: New Directions in Methodology for 1990 278-292 (1985) (Plaintiffs' Exhibit 2).

in various size categories as proportions of the nation. Those analyses, and testimony explaining and expanding upon them, were introduced into evidence at trial. Id.

At trial, plaintiffs also showed that the Secretary's characterization of the Bureau's analyses betrayed either a misunderstanding or misuse of the data. For example, the Secretary reported that the Bureau's analysis showed that adjustment would "worsen" accuracy for 21 states (in terms of shares of the national population) and, with a modification of the Bureau's analysis, would "worsen" accuracy for 28 or 29 states. But that report reflected two fundamental errors: the Secretary was ignoring both the magnitudes and the probabilities of the errors. Adjustment would most clearly improve distributive accuracy where it has the greatest impact, in states such as California and Wisconsin that have very large relative undercounts or overcounts. In states with small relative under- or

overcounts, i.e., where the difference between the unadjusted and the adjusted shares is small, it is less clear, but also less important, whether adjustment represents an improvement in distributive accuracy. Many of the states that the Secretary said would be "worsened" by adjustment would in fact be virtually unaffected: adjustment would have changed their shares of the national population too little for any practical impact in terms of representation, funding or anything else. Ignoring the constitutionally primary purposes of the census and the indisputable improvement in census accuracy adjustment was shown to have for those purposes, the Secretary focused on potential errors of no constitutional moment. Pet. App. 77. See Tr. 993-1075. And many of the states that the Secretary said would be "worsened" had probabilities of improvement that, though less than even, were not far from it. The Secretary ignored the fact, clearly presented in the Bureau's

analyses, that the large improvements to be achieved from adjustment were much more likely than the marginal "disimprovements." Tr. 995, 1001-1075. The Secretary also ignored the fact that the places clearly improved contained the great majority of the nation's population.[5]

Referring specifically to the Bureau's analyses (and the Secretary's interpretation of them), the district court stated, "This Court is satisfied that for most purposes the PES resulted in a more accurate -- or to be statistically fashionable, less inaccurate -- count than the original census," Pet. App. 59, and found that "plaintiffs have made a compelling attack . . ., and the Secretary has conceded that the objective criteria used to measure the adjusted counts show a greater numeric accuracy at the national level

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[5] In the court of appeals, the United States conceded the defects just mentioned in the Secretary's attempted analysis of the number of states whose shares could be expected to be improved or worsened by adjustment. Federal Appellees' Court of Appeals Brief 47 n.16.

and that the Census Bureau estimates of distributive accuracy marginally favor the adjusted counts," Pet. App. 77. The district court agreed with plaintiffs that "adjustment is statistically feasible, and would improve the quality of the counts for most purposes while ameliorating the profoundly disturbing problem of differential undercount," Pet. App. 94-95, and stated that, "were this Court called upon to decide this issue de novo, I would probably have ordered the adjustment," Pet. App. 89. But the court concluded that its role was limited to determining whether the Secretary's decision was arbitrary and capricious, Pet. App. 90-91, when measured against the Secretary's Guidelines, see Pet. App. 69. So limited, the court determined that "the Secretary's decision not to adjust is [not] so far beyond the pale of reason as to be arbitrary or capricious," Pet. App. 89. Although the court undertook no independent analysis of the constitutionality of the

Secretary's decision, the court concluded, based on its finding that the Secretary's decision was not arbitrary or capricious that the decision "does not violate the [Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA")], the Constitution, the [July 1989] Stipulation, or any statute." Pet. App. 94.

2. On appeal, plaintiffs argued that the district court had adopted the wrong standard for review of the Secretary's decision. Plaintiffs contended that the Secretary's decision affected constitutional rights, because the differential undercount had been shown to result in a malapportionment of the House of Representatives and to affect intra-state redistricting, and that the district court's deferential review of his decision was therefore erroneous. Plaintiffs argued that the district court should have reviewed the Secretary's decision de novo.

The court of appeals agreed with plaintiffs that the lower court had erred in the deference it accorded the Secretary but rejected plaintiffs' argument for de novo review. The court of appeals reasoned that, since this case involves claims that the unadjusted census deprives citizens of equal votes by diluting the voting strength of residents of areas with high undercount, the Secretary's decision was to be reviewed under a line of analysis that begins with Baker v. Carr, 369 U.S. 186 (1962), and continues through Karcher v. Daggett, 462 U.S. 725 (1983). Pet. App. 26-31. That line of cases, according to the court of appeals, (1) requires that, as near as practicable, one person's vote must be worth as much as another's; (2) holds that the right to vote is impaired by dilution as well as by complete disenfranchisement; and (3) imposes upon states the obligation to make a good-faith effort to achieve the goal of one-person, one-vote. Pet. App. 31. The court of appeals

concluded that the same reasoning applies, mutatis mutandis, to federal decisions bearing on equality of representation. Because of separation of powers considerations, the court of appeals determined, de novo review would be inappropriate. Pet. App. 34. And because of constitutional constraints, precise equality of populations in congressional districts cannot be maintained across state lines. Nonetheless, the court of appeals reasoned that recent decisions of this Court, including United States Dep't of Commerce v. Montana, 503 U.S. 442, 463-464 (1992), and Franklin v. Massachusetts, ___ U.S. ___, 112 S.Ct. 2767, 2777 (1992), teach that a good-faith effort to achieve equality of voting power as nearly as is practicable is required of federal officials in the discharge of responsibilities to conduct and report the census. Pet. App. 34-35.

Applying Karcher v. Daggett, 462 U.S. at 730-731, the court of appeals held that the burden was initially on plaintiffs to show that the Secretary had failed to make a good-faith effort to achieve a census as accurate as practicable. Pet. App. 36-37. The court held that plaintiffs had met that burden by demonstrating that the adjusted counts were generally more accurate, especially with respect to alleviating the differential undercount of minorities, and by showing that the Secretary had declined to adopt the more accurate adjusted counts because he remained uncertain about distributive accuracy at some smaller geographic levels. Pet. App. 38-39.

Following Karcher, 462 U.S. at 740, the court of appeals concluded that plaintiffs' proof sufficed to shift the burden to the Secretary to show that use of the less accurate unadjusted census data "(a) furthers a governmental objective that is legitimate, and (b) is essential for the

achievement of that objective." Pet. App. 37, 40. The court of appeals remanded the case to permit the Secretary to essay that demonstration.

REASONS FOR DENYING THE PETITION

1. The Petitions Fail to Present Unusual Circumstances Warranting Interlocutory Review

The petitions seek interlocutory review by this Court. As the United States recognizes, "The court of appeals in this case did not squarely hold that the Secretary's decision against adjustment violated the Constitution." U.S. Pet. 28. Nor did the court of appeals discuss appropriate relief to be awarded by the district court, should that court on remand find in favor of plaintiffs. Ordinarily, the writ of certiorari is not granted to review interlocutory orders. See Virginia Military Institute v. United States, ___ U.S. ___, 113 S.Ct. 2431

(1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction") (collecting cases). Issuance of a writ of certiorari in cases presented for review of interlocutory orders is confined to instances in which review "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." American Construction Co. v. Jacksonville, T. & K. R. Co., 148 U.S. 372, 384 (1893). "[E]xcept in extraordinary cases, the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). See R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 4.18, pp. 195-198 (1993).

Wisconsin and Oklahoma do not, in their petitions, acknowledge that they seek review of an interlocutory order; accordingly, they present no extraordinary circumstances to justify issuance of the writs they seek.

The United States, by contrast, admits that "the interlocutory posture of the case might in other circumstances weigh against review by this Court," but suggests that "unusual circumstances" warrant review now. U.S. Pet. 28.

The United States identifies only two "unusual circumstances" to justify the grant of certiorari at this stage of the litigation. First, the United States argues that the failure to grant review will mean that "this case may well remain unresolved at or near the time of the 1996 presidential and congressional elections, [which] could be avoided if this Court grants review at this time." U.S. Pet. 29. Obtaining two extensions of time in the process, the United States delayed until June 1995 to file a petition for review of the court of appeals' decision, rendered in August 1994; were the United States seriously committed to expedited resolution of this case, its prompt filing of a

petition for certiorari would have permitted denial of the petition for interlocutory review, remand to the district court and review by this Court after final judgment before the 1996 elections. Having acted tardily, the United States should not now be heard to invoke an exigency of its own making as a basis for interlocutory review. In any event, this case was also unresolved at the time of the 1992 presidential and congressional elections (at which time the case had been tried to the district court and a decision after trial was pending) and at the time of the 1994 congressional elections (at which time the case had been decided by the court of appeals and petitions for rehearing filed by the states of Wisconsin and Oklahoma were sub judice). The United States cites nothing to suggest that any uncertainties created by the pendency of the district court's decision in 1992 or the existence of the unreviewed court of appeals decision in 1994 created any extraordinary inconvenience or

embarrassment for anyone at all, let alone petitioners in particular.[6]

The second putatively "unusual circumstance" the United States identifies is that "[n]o further proceedings are needed to clarify the issues presented or to render the case suitable for resolution by this Court." U.S. Pet. 29. Far from being unusual, however, that is the status petitioners can commonly claim in cases in which a court of appeals vacates the judgment of a district court and remands for further proceedings. That was, for example, the situation in Virginia Military Institute, in which the court denied a petition for certiorari after the court of appeals had vacated the judgment of the district court in favor of Virginia

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[6] Indeed, the situation in the fall of 1994 was more uncertain than it is now, since it was understood then that the federal defendants would probably not be seeking review of the court of appeals' decision. See B. Vobejda, "Administration Lets Census Ruling Stand; Decision Awaits on Use of Adjusted Numbers," Washington Post (September 22, 1994), at A18.

Military Institute and remanded the case for determination of an appropriate remedy. Concurring in the denial of the petition for certiorari, Justice Scalia noted his view that it was "prudent" to defer review until "the litigation below has come to final judgment."

Similar prudence is appropriate here. The United States offers as the question presented by its petition that of: "Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment of the 1990 census violated the Constitution." U.S. Pet. i. But the United States also acknowledges that the court of appeals did not "squarely" address that question. U.S. Pet. 28. And although the district court summarily concluded that the Secretary's decision did not violate the Constitution, inter alia, Pet. App. 94, the thrust of that court's analysis was directed at determining whether the decision was arbitrary and capricious in light of the Secretary's guidelines and

under the APA, Pet. App. 61-91. Thus, if this Court grants the pending petitions, it will be (on the United States' own view of the case) the first tribunal to consider whether the Secretary's decision violated the Constitution. Because this Court does not "ordinarily address for the first time . . . an issue which the Court of Appeals has not addressed," J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 568 (1981), respondents submit that that is not a basis for the prudent exercise of certiorari jurisdiction.

Other related considerations yield the same conclusion. The present state of the record, despite the United States' assurances, requires at least some modest additions. Consider, for example, the question of the Bureau's best current estimate of overall undercount in the uncorrected 1990 census. In its petition, the United States first acknowledges that the Secretary of Commerce estimated the overall undercount to be 2.1% of the national

population. U.S. Pet. 4, citing Pet. App. 158. Then the United States says that the Bureau subsequently "represented at the trial in this case that the undercount was 1.6% of the population." U.S. Pet. 4, citing Pet. App. 58 n.12. The cited source is in the trial court's opinion, but not from the trial: it reflects the district court's reading of a newspaper story that appeared in December 1992, more than a half year after the trial ended and the record closed. Next, citing a 1993 publication by Barbara E. Bryant, then Director of the Bureau, the United States says the Bureau subsequently lowered its estimate of the undercount to 0.9% to 1.2%. U.S. Pet. 4 n.4. Finally, citing no source at all, the United States asserts that, "The Commerce Department now believes, however, that 1.6% is the correct estimate of the undercount."

The United States is not prepared to stipulate that the outcome of a remand is a foregone conclusion. The

Second Circuit imposed upon the Secretary, on remand, a precisely stated burden: to show that the decision against adjustment "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." Pet. App. 40. That burden, to be sure, is more onerous than what the district court required of the Secretary. But the United States has not claimed that the standard dictates the result. We do not believe it can be inferred from the United States' silence in its petition that, on remand, the United States will deem itself bound to confess judgment. On the contrary, we believe that this Court should have the benefit of the United States' proffer and its disposition by the lower courts.

Finally, no court has yet considered what, if any, relief would be appropriate upon plaintiffs' proof of their claims. The United States has specifically reserved at least the argument that, even were the case remanded to the

district court and the district court to enter judgment in favor of plaintiffs, an order requiring reapportionment of the House of Representatives would be inappropriate. U.S. Pet. 27 n.24. There is no suggestion in any of the petitions, nor anywhere else in the record, that this case is one in which interlocutory review is needed to protect petitioners against injuries that would occur as a consequence of the entry of a final judgment in plaintiffs' favor and that could not be completely redressed through full review after final judgment in keeping with this Court's usual practice.

2. The Decision of the Court of Appeals, Which Vacated the Judgment of the District Court and Remanded the Case for Further Proceedings, Was Correct

Petitioners' argument that no further proceedings are necessary before review of the court of appeals' decision rests fundamentally on the claim that that decision is so obviously and grievously flawed that it merits immediate

reversal. The United States purports to identify three major defects in the court of appeals' decision: that the court of appeals erroneously preferred numeric to distributive accuracy and rejected the Secretary's well-reasoned reliance on distributive accuracy, U.S. Pet. 22; that the court of appeals had no basis for its conclusions that plaintiffs had shown the adjusted data to be more accurate and that plaintiffs had shown the Secretary's contrary determination did not reflect an effort to achieve the most accurate census practicable, U.S. Pet. 23; and that the court of appeals wrongly mandated heightened scrutiny of the Secretary's decision merely because that decision had a racially disparate impact, U.S. Pet. 23-26. In fact, the court of appeals' decision reflects no misunderstanding of the Secretary's decision or the record of the case and no departure from this Court's precedents.

a. There is not, and never has been, any dispute in this litigation (or among experts on the adjustment issue) that distributive accuracy is the object of adjustment. Virtually all of the loss function analyses conducted by the Bureau and presented at trial were comparisons of distributive accuracy. See Pet. App. 366 (Bureau used "loss function analysis to assess the accuracy of the distributions of population across states, places, and counties for the adjusted and unadjusted census"). That is apparent from the district court's opinion, which explicitly accepts the primacy of distributive accuracy, Pet. App. 77, and, equally explicitly, finds that the Bureau's analyses demonstrated the superior accuracy of the adjusted counts "for most purposes," Pet. App. 59. The parties' dispute over those analyses was not over whether distributive accuracy was the appropriate criterion for decision. Rather, the dispute was over whether the Secretary, by rejecting the

Bureau's analyses of distributive accuracy in favor of his own interpretations of the data, decided against the most distributively accurate census practicable. See Pet. App. 21.

The United States asserts that the court of appeals, erroneously preferring numeric to distributive accuracy, faulted the Secretary for his contrary preference, while "entirely fail[ing] to explain how the goal of equal representation for equal numbers of people in the several States could be better served by focusing on the total numeric accuracy of the census figures at the national level." U.S. Pet. 22 (emphasis in original). But that assertion misstates the court of appeals' analysis. The critical paragraph in the court of appeals' decision, in which the court explained the basis for its conclusion that the Secretary's judgment was not made in good faith, is as follows:

> In the present case, the findings of the district court . . . plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable. Those findings are supported by, inter alia, the Secretary's acknowledgement that the PES-indicated adjustments would likely not only make the census more accurate nationally, but would also reduce the disparate impact of the census' inaccuracies on minority groups, and that he gave other factors priority over achievement of greater accuracy. For example, he stated that he valued "distributive accuracy" over numerical accuracy; and in stating that an adjustment would not be made because it would not result in greater distributive accuracy, the Secretary revealed that he would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate.

Pet. App. 38 (emphasis in original). The court of appeals did not state that it concluded numeric accuracy was more important that distributive accuracy. Rather, the court gave

it as the Secretary's conclusion that residual uncertainty about what he called "distributive accuracy" was more important than certainty about "lessen[ing] the disproportionate undercounting of minorities" -- which he called "numeric accuracy."

The Bureau had developed the PES as a census adjustment technique precisely because of a concern for the distributive consequences of differential undercounting of members of minority groups. Pet. App. 50-51. If members of minority groups were evenly distributed throughout the nation, the differential undercount would have had no consequences in terms of representation or funding. But they are not so distributed: they are concentrated in certain areas. Pet. App. 17. That is why the differential undercount has "deleterious effects on the accuracy of census counts" and "unfair results aris[e] from such inaccuracy," Pet. App. 50.

The Secretary conceded that the "PES-adjusted estimates reflect more accurately the total population and the racial and ethnic populations of the country." Pet. App. 146 (emphasis supplied). With that concession, the Secretary also conceded (albeit tacitly) that, ceteris paribus, adjustment would improve the distributive accuracy of the census. The Secretary himself chose to describe that consequence, misleadingly, as only "[i]mproved numeric accuracy," Pet. App. 147. The court of appeals, by contrast, recognized the distributive (i.e., geographically differential) consequences of the differential undercount: "The impact of the differential undercount was naturally more severe in those areas in which racial and ethnic minorities were more concentrated." Pet. App. 17. The court of appeals' decision reflects a primary concern with the distributive consequences of the undercount; understandably, the decision does not present a justification

for a preference for numeric accuracy, because the decision reflects no such preference.

b. The United States discounts as unexplained the district court's several findings that the adjusted data had been shown to be more accurate. U.S. Pet. 23. But the district court's statement that it was "satisfied that for most purposes the PES resulted in a more accurate" census, Pet. App. 59, follows a description of how the Bureau measured error in the PES and compared the accuracy of the adjusted and the unadjusted counts, id. That analysis formed the basis for the district court's further statement that, had it been considering the issue de novo, it "would probably have ordered the adjustment." Pet. App. 89. Those findings provide a solid basis for the court of appeals' conclusion that plaintiffs had shown the adjusted counts to be more accurate.

Because it confined itself to determining whether "the Secretary's conclusions under each guideline" were arbitrary and capricious, the district court did not set aside the Secretary's decision. Pet. App. 89. Deferring to the Secretary's authority both to set the criteria for decision by creating the guidelines and to decide the adjustment issue by applying his guidelines, the district court concluded that "under Guideline One, the presumption of accuracy runs in favor of the original census count," Pet. App. 84, and thus that the Secretary's decision would stand unless plaintiffs demonstrated the superior accuracy of the adjusted counts both (1) at every level mentioned in Guideline One, and (2) for every reasonable definition of accuracy, Pet. App. 78. Invoking that high standard, the district court deferred to the Secretary's interpretation of the loss function analysis for states and his stated concern about the absence of "direct evidence" for improvement of distributive accuracy

for places of under 100,000 persons.[7] Pet. App. 78. In the district court's view, all of the evidence that had satisfied that court that the adjusted counts were more accurate, Pet.

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[7] The Secretary's ostensible concern about the absence of "direct evidence" for places of under 100,000 population disregarded the Bureau's conclusions that "adjusted counts are generally more accurate" for small areas and the specific results of Bureau analyses showing improved distributive accuracy for "metropolitan places of less than 25,000, 25,000-49,000 and 50,000 or more, and for nonmetropolitan places less than 25,000 and 25,000-49,000 in total," Pet. App. 192.

Another ostensible concern mentioned by the Secretary -- that adjustment would worsen distributive accuracy for 11 of 23 cities with populations over 500,000, Pet. App. 141 -- was not discussed at trial because defendants there never relied upon it. In stating that concern the Secretary's decision repeats both of the mistakes identified with respect to the Secretary's report that adjustment would "worsen" distributive accuracy for more than twenty states -- disregard of both magnitude and probability of error. See above, pp. 20-22. Moreover, the loss function analysis for large cities considers only the cities' relative shares of the population living in such cities -- not the cities' shares of the national population or of their respective states. Large cities do not compete directly (let alone exclusively) with one another for representation or funding. The comparison, even if properly executed, thus involves a factor of no constitutional (or other legal) significance.

App. 59, was insufficient to overcome the powerful presumption created by Guideline One.

The court of appeals disapproved the district court's extreme deference. Following this Court's teaching in Montana, 503 U.S. at 460-464, and on the analysis therein of the line of authority that runs from Wesberry v. Sanders, 376 U.S. 1 (1964), through Karcher v. Daggett, 462 U.S. 725 (1983), the court of appeals observed that the requirement of a "good-faith effort" to achieve equality, where allocation of political representation is at issue, is imposed on federal, as well as state, actors. The court of appeals recognized that constitutional constraints on the apportionment of the House of Representatives mean that "the goal of precise equality in voting power is 'illusory for the Nation as a whole,'" Pet. App. 35 (quoting Montana, 503 U.S. at 463), but concluded that "[t]he impossibility of

achieving precise mathematical equality is no excuse for not making this mandated good-faith effort." Pet. App. 35.

Applying the analytic framework of Karcher, 462 U.S. at 730-731, the court of appeals accepted the district court's finding that the adjusted counts had been shown to be more accurate, Pet. App. 21-22, and proceeded to the question of whether plaintiffs had carried their burden of showing the decision to use less accurate data "was not the product of a good-faith effort to achieve equality," Pet. App. 37. In considerable detail, the court of appeals spelled out the bases for its determination that plaintiffs had carried that burden. Pet. App. 38-39.

Despite the United States' argument, U.S. Pet. 16-17, nothing in Franklin v. Massachusetts is to the contrary. Franklin holds that the standard for reviewing a decision by the Secretary concerning conduct of the census is "consisten[cy] with the constitutional language and the

constitutional goal of equal representation." Franklin, 112 S.Ct. at 2777 (emphasis supplied). The court of appeals explicitly applied the Franklin standard in determining that the Secretary was "required to make a good-faith effort to achieve the Constitution's plain objective of equal representation for equal numbers of people." Pet. App. 35.

c. The court of appeals did not proceed in contravention of Washington v. Davis, 426 U.S. 229 (1976). Citing Washington, the court explained that "[a]lthough for most types of equal protection claims, a plaintiff must show that the government's discrimination was intentional, the Supreme Court has not imposed such a requirement in any of the cases involving apportionment." Pet. App. 35-36 (citations omitted). In such cases, a plaintiff is required to show only "that the governmental entity failed to make a good-faith effort to achieve equal districts as nearly as practicable." Pet. App. 36. The court

of appeals also explained that the right sought to be vindicated in apportionment cases is one of equal protection.[8] Pet. App. 31.

The racial and ethnic character of the differential undercount is relevant because it establishes that the uncorrected census compromises the equality of allocations of political representation based thereon. The court of appeals stated that, "[i]n general, if a law alleged to infringe a certain right directly would require a heightened degree of scrutiny, heightened scrutiny should also be given when the law is alleged to infringe that right discriminatorily." Pet. App. 33. The heightened scrutiny is occasioned by the nature of the right infringed, not by the fact of direct or discriminatory infringement. Thus, the court of appeals did not conclude that heightened scrutiny

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[8] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976).

was warranted simply because the differential character of the undercount peculiarly affects minorities. And surely a decision that impairs equal representation is subject to no lower scrutiny simply because a disproportionate number of those whose voting strength is diluted are members of minority groups.

By recasting the issue as one involving the necessity of proving intent, the United States avoids any discussion of the court of appeals' actual analysis.[9] Notably, though

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[9] The United States, admitting that "it is undisputed that racial minorities were disproportionately undercounted in the 1990 census," then argues that it has not been shown "that a failure to adjust the census totals would in turn have a disparate racial impact with respect to the proper allocation of Representatives among the States, the only constitutionally prescribed use of census data." U.S. Pet. 26. In terms of the apportionment of the House, the adjustment considered by the Secretary in 1991 would have shifted two seats, one from Wisconsin to California, one from Pennsylvania to Arizona. In each instance, a seat would have shifted from a state with a disproportionately white population and lower-than-average undercount to a state with a disproportionately non-white population and greater-than-average undercount. Thus, on average, adjustment would have increased the representational

proclaiming that the decision against adjustment was made without discriminatory animus, the Untied States fails to assert that it was made in a good faith effort to enhance census accuracy. Similarly, the United States fails to explain what legitimate governmental objective reliance upon the unadjusted count is essential to achieve. On remand, the United States will have the opportunity to complete the record in this case by proffering such an explanation.

3. There Is No Conflict among the Courts of Appeals to Warrant Review by This Court

Dissenting in the court of appeals below, the late Judge Timbers stated that "[t]he only two other circuits that have ruled on this issue have agreed with Judge

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strength of areas with higher concentrations of minorities. Obviously, the shifted seats might have been filled by white Representatives. But the Constitution guarantees only that electoral power will be allocated to constituencies on a racially-neutral basis, not that the racial composition of any legislature will reflect national demographic proportions.

McLaughlin," citing City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994); Tucker v. United States Dep't of Commerce, 958 F.2d 1411 (7th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 407 (1992). Judge Timbers thus described the Second Circuit's decision as "creat[ing] a conflict among the circuits." Pet. App. 40.

It is true that neither the Sixth nor the Seventh Circuit ordered that the census be statistically adjusted or held that the Secretary's decision violated the Constitution. But neither did the Second Circuit order an adjustment or conclude that a constitutional violation had occurred. In fact, examination of the relevant decisions reveals that, notwithstanding the dissent in the Second Circuit, the three cases addressed different issues under different analyses; there is no conflict among them, certainly none that warrants review now by this Court.

Tucker was the first of the three cases to be decided.[10] While the census, including the PES, was still being conducted, and thus before Secretary Mosbacher had announced his decision concerning adjustment, the Tucker plaintiffs sought an order that the census be adjusted by unspecified means to correct for undercounting in Illinois.[11] Tucker v. United States Dep't of Commerce, 135 F.R.D. 175, 176 (N.D. Ill. 1991). The district court, concerned

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[10] It was not, of course, the first to be filed. The present case was filed first, in 1988. Tucker was filed in 1990, and City of Detroit in 1991. The earlier decision in Tucker is attributable to the decision of the plaintiffs in that case to seek adjustment of the census without waiting for Secretary Mosbacher's decision.

[11] The Tucker plaintiffs did not, and could not, challenge the apportionment of the House of Representatives, because no plausible correction for undercount in the 1990 census would have added a seat to (or, for that matter, subtracted a seat from) Illinois' delegation. To the extent that the Tucker plaintiffs complained that they had been denied federal representation, see Tucker, 135 F.R.D. at 176, their complaint was that they were underrepresented vis-a-vis residents of other parts of Illinois.

that the outcome of that case might differ from that in other litigation, found the action non-justiciable. Id., 135 F.R.D. at 181-182..

The Seventh Circuit affirmed, on other grounds. That court of appeals rejected the district court's conclusion that the case was non-justiciable as presenting a political question, Tucker v. United States Dep't of Commerce, 958 F.2d at 1415, but affirmed the result, holding that plaintiffs' suit was barred by the intended-plaintiff doctrine, id., 958 F.2d at 1416. In the view of the Seventh Circuit, the Tucker plaintiffs could not show that, even assuming a violation of a constitutional or statutory right, they were "within the class of persons who have been given a right to litigate the violation." Id. (emphasis in original). In arriving at that result, the Seventh Circuit determined only that "Article I, section 2, clause 3 [("Apportionment Clause")] does not authorize lawsuits founded on

disagreement with the Census Bureau's statistical methodology." Id., 958 F.2d at 1418. The Seventh Circuit did not have before it, and so did not consider, a challenge to the Secretary's decision under the Fifth Amendment.[12]

In discussing its application of the intended-plaintiff doctrine, the Seventh Circuit suggested that the same doctrine would bar Massachusetts' suit, which later reached this Court in Franklin v. Massachusetts. Obviously, this Court did not follow the Seventh Circuit's approach, and Wisconsin admits that "this Court's decision in Franklin v. Massachusetts casts doubt on Tucker's specific holding," Wisc. Pet. 16, while the United States does not even

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[12] Indeed, the court of appeals' decision in Tucker mentions the Secretary's decision only once, in a passing reference during a preliminary statement of the background of the case. And while it is arguable that the Seventh Circuit also considered the viability of a challenge under the APA, see id., 958 F.2d at 1416, in context it is clear that the court had in mind a general challenge to the technique of census-taking adopted by the Bureau, not a specific challenge to the Secretary's actual decision.

describe the holding in Tucker and that in this case as being in conflict, U.S. Pet. 26-27. Moreover, in light of Franklin v. Massachusetts, no petitioner here suggests that this Court adopt the Seventh Circuit's application of the intended-plaintiff doctrine. In any event, the specific proposition for which all three petitions cite the court of appeals' decision in Tucker -- that the Apportionment Clause does not per se authorize a suit founded on nothing more than a disagreement with the Bureau's census methodology[13] -- conflicts with nothing in the Second Circuit's decision.

Like Tucker, City of Detroit was a local case, brought by the City of Detroit and its mayor to compel an adjustment or revision of the census for Michigan alone.[14]

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[13] Wisc. Pet. 17, Okla. Pet. 13, U.S. Pet. 27.

[14] As with the Tucker plaintiffs, the City of Detroit plaintiffs alleged that undercounting had deprived them of representation in Congress. City of Detroit, 800 F. Supp. at 540. No national adjustment would have added to (or subtracted from) Michigan's allocation of seats in the House of Representatives; however, the City of Detroit plaintiffs

City of Detroit v. Franklin, 800 F. Supp. 539, 540 (E.D. Mich. 1992). Affirming the trial court's grant of summary judgment, id., 800 F. Supp. at 542-547, the Sixth Circuit held that: (1) with respect to plaintiffs' claims concerning intra-state redistricting, they lacked standing, because the state was at liberty to use other than federal census data for redistricting and there was thus no causal nexus between the challenged (census-taking) conduct and the asserted (representational) injury, City of Detroit, 4 F.3d at 1372-1374; and (2) with respect to plaintiffs' claims concerning federal funding, the Apportionment Clause per se did not create "a right to census accuracy," and an adjustment of Michigan alone, leaving other states untouched, would not increase the overall accuracy of the census, id., 4 F.3d at 1375-1378. While the court of appeals in City of Detroit did refer to the Secretary's decision, it did so only to

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argued that Michigan alone should receive adjusted census figures. City of Detroit, 4 F.3d at 1377.

buttress the point that a special adjustment for Michigan would be "impractical," id. at 1378.

Once again, no petitioner suggests that this Court adopt the Sixth Circuit's standing analysis.[15] Oklahoma and the United States cite the Sixth Circuit's quotation, City of Detroit, 4 F.3d at 1378, of language from Tucker, 958 F.2d at 1418, that a "claim to a census adjustment invokes no judicially administrable standards." That language, however, is part of the Seventh Circuit's analysis of the intended-plaintiff doctrine, as applied to the case before that court, and is inapplicable to the present case. Notably, the United States never argues that either the Sixth or the

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[15] Wisconsin, despite having observed that the continuing vitality of the Seventh Circuit's decision in Tucker is questionable and that the Sixth Circuit's decision in City of Detroit "follow[s] Tucker's reasoning," Wisc. Pet. 17, suggests that the Second Circuit should have considered plaintiffs' ability to use the adjusted data for intra-state redistricting but does not suggest that that consideration (whatever its result) would have affected plaintiffs' standing. Wisc. Pet. 17-18.

Seventh Circuit was correct in concluding that a claim to a census adjustment can never be said to invoke judicially administrable standards -- certainly the United States makes no such argument about the claim presented here. Given the nature of the claim before the Sixth Circuit, there is nothing in City of Detroit, any more than in Tucker, that conflicts with the Second Circuit's decision.

Neither Tucker nor City of Detroit involved a claim affecting the national apportionment of the House of Representatives, neither considered a challenge under the Fifth Amendment to the Secretary's decision, and certainly neither addressed the standard of review appropriate upon such a challenge. Although all three courts of appeals dealt generally with matters of census adjustment, they were presented with very different questions: the different substantive results reflect those differences, not a conflict among the circuits.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari in Nos. 94-1614, 94-1631 and 94-1985 should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents do not dispute that the question presented in this case has substantial legal and practical importance. Rather, they contend that further review is not warranted because the court of appeals' decision is correct and is not in conflict with *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992), or *City of Detroit* v. *Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994). Respondents further contend that the interlocutory posture of the case makes review by this Court inappropriate.

As demonstrated in our petition for certiorari, however, the court of appeals' decision is fundamentally flawed and conflicts with *Tucker* and *City of Detroit*, which rejected challenges to the decision of the Secretary

of Commerce not to undertake a statistical adjustment to the 1990 census. Moreover, a detailed record concerning the Secretary's adjustment decision has already been developed, and the additional proceedings ordered by the court of appeals are very unlikely to assist this Court in resolving the question presented.

1. In our petition for certiorari, we explain that the court of appeals erred in (1) focusing on the total numeric accuracy of the census figures at the national level rather than on the distributive accuracy of the adjusted and unadjusted numbers, and (2) invoking heightened scrutiny on the ground that the unadjusted census figures resulted in a differential undercount of minorities, even though there was no showing or finding of intentional discrimination. See Pet. 20-26. Tellingly, respondents make no effort to defend either of those bases for the holding below. See Br. in Opp. 38-42, 49-52.[1] Respondents instead deny that those propositions even played a role in the court of appeals' analysis. Thus, they argue (Br. in Opp. 41-42) that the court of appeals did not itself express a preference for numeric accuracy over distributive accuracy, and they dispute our contention that the court of appeals' analysis is inconsistent with *Washington* v. *Davis*, 426 U.S. 229 (1976), which held that establishment of an equal protection violation based upon racial discrimination requires proof of discriminatory purpose. Br. in Opp. 49; see Pet. 24. According to respondents (Br. in Opp. 47-48), the court of appeals merely applied to the federal government the requirement that state officials conducting redistricting must

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[1] Indeed, respondents acknowledge (Br. in Opp. 39) that "distributive accuracy is the object of adjustment" and that "[t]he parties' dispute * * * was not over whether distributive accuracy was the appropriate criterion."

make "a good-faith effort to draw districts of equal population," and that the burden shifts to the government to justify any failure to do so. *Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983). Respondents are simply wrong in their characterization of the decision below.

Although the court of appeals did recite the *Karcher* standard, see Pet. App. 36-37,[2] its application of that standard was seriously flawed. First, the court of appeals ignored this Court's admonition that Congress's "apparently good-faith choice of a method of apportionment of Representatives among the several States 'according to their respective Numbers' commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 464 (1992); see Pet. 21-22. Moreover, in concluding that the Secretary's decision against adjustment "did not reflect an effort to achieve equality as nearly as practicable," the court of appeals placed almost exclusive reliance on the facts that the Secretary "valued 'distributive accuracy' over numerical accuracy," and that the contemplated adjustment "would lessen the disproportionate undercounting of minorities." Pet. App. 38; see also *id.* at 4 ("We vacate and remand for the [district] court to determine whether the Secretary's decision not to make an adjustment in order to improve the overall count and reduce the disproportionate undercounting of minority groups was essential to the achievement of a legitimate governmental interest."); *id.* at 39 ("the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable").

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[2] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by the State of Wisconsin in No. 94-1614.

Thus, the court's application of the *Karcher* standard unquestionably rested on the numeric accuracy of the adjusted census figures at the national level, and it ignored this Court's holding that racially disparate impact, unconnected to any showing of discriminatory purpose, is insufficient to establish an equal protection violation.

In order to make out a prima facie case under *Karcher*, a plaintiff must show that state officials did not make a good faith effort to achieve equality as nearly as practicable among congressional districts. See 462 U.S. at 730. By parity of reasoning, a plaintiff must show, as a threshold matter, that the Secretary did not make a good faith effort to achieve equality of voting power as nearly as practicable among the States. In other words, the plaintiff must show the lack of a good faith effort to maximize distributive accuracy. Respondents failed to make that showing in two respects. First, they do not deny that the Secretary's extraordinary undertaking in conducting the census itself (see Pet. 3-4, 25 & nn.22 and 23) satisfied any applicable standard of good faith. Second, as the court of appeals appeared to recognize (see Pet. App. 38), respondents did not establish that the distributive accuracy of the adjusted figures was superior to that of the unadjusted figures.

2. Respondents argue that the proposed adjustment would have increased the distributive accuracy of the census. They contend as well that the Secretary implicitly conceded the superior distributive accuracy of the adjusted figures. Those arguments are without merit.

a. In explaining his decision against adjustment, the Secretary acknowledged the "diversity of opinion among [his] advisors." Pet. App. 140; see Pet. 7. After consideration of those competing views, however, the

Secretary concluded that "the evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration." Pet. App. 185. The district court carefully examined the administrative record and conducted a lengthy trial, and it concluded that the Secretary "was neither arbitrary nor capricious" in determining that the superior distributive accuracy of the adjusted figures had not been demonstrated. *Id.* at 77. Respondents have not challenged that holding in the court of appeals or in this Court. Their discussion of technical features of selected data in the administrative record (see Br. in Opp. 18-22) is consequently beside the point.

b. Respondents also contend that the Secretary

> conceded that the 'PES-adjusted estimates reflect more accurately the total population *and the racial and ethnic populations of the country*.' With that concession, the Secretary also conceded (albeit tacitly) that, *ceteris paribus*, adjustment would improve the *distributive* accuracy of the census.

Br. in Opp. 43 (quoting Pet. App. 146) (emphasis supplied in Br. in Opp.). But the Secretary's statement that the adjusted estimates "reflect more accurately the total population and the racial and ethnic populations of the country" (Pet. App. 146) plainly refers to population data at the national level. The Secretary recognized that the adjusted census figures would more accurately estimate the country's total minority population. He did not suggest—much less concede—that the adjusted numbers would more accurately estimate the actual distribution of the (minority and non-minority) population among the various States and political subdivisions.

c. Respondents assert that "[b]ecause members of minority groups are not evenly distributed geographi-

cally, the consequence of the differential undercount is that areas in which members of minority groups are concentrated are systematically deprived of political representation and funding they would otherwise have received." Br. in Opp. 9. In support of that assertion, they cite (*ibid.*) the testimony of two witnesses who stated, in conclusory terms, that the undercount would have that effect in local areas or among districts within a State. See Tr. 92, 1197-1198. Respondents made no comprehensive effort at trial, however, to demonstrate whether and to what extent States with large minority populations would have been credited with higher shares of the country's population if the proposed adjustment had been made, let alone to demonstrate that their share of the population would have been *more accurately* estimated by use of adjusted figures. [3]

Respondents' basic argument is that if use of an adjustment would alleviate the racially differential undercount at the national level, then, "*ceteris paribus*, adjustment would improve the *distributive* accuracy of the census." Br. in Opp. 43. The flaw in that argument lies in its premise ("*ceteris paribus*") that other things would remain equal—that the proposed statistical adjustment would lessen the racial disparity without introducing new errors or uncertainties into the enumeration. After extensive consideration of the views of experts on both sides of the adjustment question, the Secretary reached a dif-

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[3] The only constitutionally mandated use of census data at issue in this case is in the apportionment of Representatives among the States. The drawing of congressional, state legislative, or other districts within a State is the responsibility of state or local officials, and does not furnish grounds for seeking an adjustment of census data or other relief against federal officials. See *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1372-1374 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994).

ferent conclusion. He noted that he was "deeply troubled by this problem of differential participation and undercount of minorities," but concluded that "an adjustment does not address this phenomenon without adversely affecting the integrity of the census." Pet. App. 139.[4]

3. Respondents contend (Br. in Opp. 52-60) that the decision below does not conflict with *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992), or *City of Detroit* v. *Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217(1994). Respondents are incorrect. As in this case, the plaintiffs in both *Tucker* and *City of Detroit* sought a judicial order requiring the Secretary to undertake a statistical adjustment of the census. *Tucker*, 958 F.2d at 1418; *City of Detroit*, 4 F.3d at 1375-1378. The courts in *Tucker* and *City of Detroit* entered judgment for the government, holding that Article I, Section 2, Clause 3 of the Constitution "does not authorize lawsuits founded on disagreement with the Census Bureau's statistical

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[4] Respondents also suggest (Br. in Opp. 51 n.9) that the proposed adjustment was warranted because it would have shifted seats in the House of Representatives from Wisconsin and Pennsylvania, which allegedly have "a disproportionately white population and lower-than-average undercount," to California and Arizona, which have "a disproportionately non-white population and greater-than-average undercount." But the fact that California and Arizona have greater-than-average minority populations does not mean that the proposed adjustment is constitutionally required. Even very small changes in the assumptions utilized in developing the adjustment methodology would have resulted in different allocations of seats in the House of Representatives. As the Secretary explained in his decision, "[o]ne expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods." Pet. App. 142; see also 958 F.2d at 218. Id.

methodology" because such lawsuits "invoke[] no judicially administrable standards." *Tucker*, 958 F.2d at 1418; accord *City of Detroit*, 4 F.3d at 1376-1378. Here, by contrast, the court of appeals concluded that the Secretary had failed to make a good-faith effort to achieve equality of representation, thereby giving rise to a heightened burden of justification.[5]

Respondents contend (Br. in Opp. 57) that *Tucker* and *City of Detroit* are distinguishable because the adjustments sought in those cases were "local" in character, while respondents are seeking a nationwide adjustment. But the decisions in *Tucker* and *City of Detroit* did not turn on the geographical scope of the requested adjustments. In any event, had *Tucker* or *City of Detroit* resulted in an order compelling an adjustment, the Secretary could not realistically have limited the adjustment to the areas covered by those lawsuits. As the Sixth Circuit recognized, "[p]laintiffs' request for a statistical adjustment for Michigan alone cannot be considered in

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[5] Respondents suggest (Br. in Opp. 56, 60) that the decision below is not in conflict with *Tucker* or *City of Detroit* because those cases did not present claims under the Fifth Amendment. But the Seventh Circuit in *Tucker* expressly recognized that a disproportionate undercounting of minorities, in the absence of intentional discrimination, provides no basis for heightened judicial scrutiny under the Fifth Amendment. 958 F.2d at 1413-1414; see also *id.* at 1418. The court further explained that the intrastate redistricting cases—cases on which the court of appeals in this case relied (see Pet. App. 26-37) in concluding that heightened scrutiny of the Secretary's decision was warranted—are irrelevant to the adjustment question because they involve the judicially manageable task of "decree[ing] equality," rather than "tak[ing] sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount." 958 F.2d at 1418. Accord *City of Detroit*, 4 F.3d at 1378.

isolation. It would be impractical for this Court to order ([and] the Secretary to do) such an adjustment without considering the consequences for the other states and other cities." *City of Detroit*, 4 F.3d at 1378. The Sixth Circuit accordingly concluded that "what plaintiffs' request really comes down to is a nationwide adjustment," which, the Sixth Circuit noted, had already been rejected by the district court in the instant case. *Ibid.*

4. The fact that the decision below is interlocutory does not render review by this Court inappropriate. Although the Court ordinarily does not review interlocutory decisions, it has done so where the question presented is significant and its resolution is "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); see also *Estelle* v. *Gamble*, 429 U.S. 97 (1976).

As explained in our petition (Pet. 27), the question whether the Constitution requires an adjustment to the 1990 census has substantial national significance. Resolution of the adjustment issue at this time would remove the potential for uncertainty in the 1996 presidential and congressional elections. See Pet. 29. Moreover, it is exceedingly unlikely that the proceedings on remand would assist the Court in resolving the question presented. The Secretary's decision was based largely on three determinations: (1) distributive rather than total numeric accuracy should be given paramount importance in deciding whether to undertake an adjustment; (2) the unadjusted census figures should be treated as the most accurate unless adjusted estimates were shown to be better; and (3) the adjusted figures had not been shown to improve distributive accuracy. See Pet. 15, 29. As we

explain in our petition (Pet. 29), an extensive factual record is not needed to resolve whether the first two determinations were "consistent with the constitutional goal of equal representation," *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777 (1992), and the district court has already concluded, based on a thorough review of the administrative record and the evidence introduced during a lengthy trial, that the third determination was not arbitrary or capricious—a conclusion that respondents have not called into question in the court of appeals or in this Court. Finally, the court of appeals' decision ordering a remand rests on two factors—numeric accuracy and the disproportionate undercount of minorities—that respondents do not defend as grounds for invoking heightened scrutiny. Accordingly, review by this Court is warranted now.[6]

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[6] Respondents state (Br. in Opp. 34) that "[t]he present state of the record * * * requires at least some modest additions" and suggest that review by this Court therefore would be premature. But the only alleged deficiency in the record that respondents identify (Br. in Opp. 34-35) relates to the Commerce Department's current views as to the best estimate of the total national undercount. Formal evidence of the Department's current views on that question is unnecessary for this Court to resolve whether the Secretary's adjustment decision satisfied the requirements of the Constitution. That is so because the constitutionality of the Secretary's decision should be determined on the basis of the record that was before him at that time, and because that decision appropriately turned on an assessment of distributive rather than numeric accuracy. In any event, evidence of the Census Bureau's revisions to the undercount following the Secretary's decision was presented at trial over respondents' objection. Tr. 1777-1792.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

AUGUST 1995

Nos. 94-1614, 94-1631 and 94-1985

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF WISCONSIN,
Petitioner,
v.
CITY OF NEW YORK, *et al.*,
Respondents.

STATE OF OKLAHOMA,
Petitioner,
v.
CITY OF NEW YORK, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
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v.
CITY OF NEW YORK, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF INDIANA AND OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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OCTOBER TERM, 1995

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE STATES OF INDIANA AND OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI*

Amici—all States—have strong interests in this case. The decision of the Second Circuit, in conflict with the decisions of two other circuits, subjects the federal government to stringent new constitutional constraints on the methods by which it arrives at its census count every ten years. The ruling casts a cloud over the 1990 census count and hence the current allocation of congressional seats among the States, as well as state legislative apportionments that are based on census figures. The legal standards declared by the Second Circuit, if allowed to stand, also will significantly influence the census counts required to be conducted in 2000 and each decade after (and, possibly, the judicial analysis of government action outside the census context). In addition, the ruling has concrete effects on the allocation of large sums of federal money under dozens of federal programs that use the census count to determine the amounts distributed. *Amici* accordingly have a direct interest in having this Court resolve the uncertainty over the census issue presented in this case.

STATEMENT

Every ten years since 1790, the federal government has been conducting an actual count of people for the census required by Article I, Section 2, clause 3 of the United States Constitution, which provides that "[t]he actual Enumeration shall be made . . . [every] ten Years, in such Manner as [Congress] shall by Law direct." It is undisputed in this case that census results miss some people and that more racial minorities are missed than others. *See also* U.S. Pet. 4 (differential undercount also exists for other groups, including men, the young, and renters). In 1987, after considering demands for the use of statistical adjustments of the actual count to correct for this undercount, the United States Secretary of Commerce announced that he would not use statistical sampling methods to adjust the results of the upcoming 1990 federal census.

The following year, plaintiffs—including several States, municipalities, and individuals—brought this action to challenge the Secretary's decision, seeking to compel the adoption of statistical adjustments to the census count. The federal government moved to dismiss the complaint on the ground that the census-count methodology was not subject to judicial review. The district court denied the motion, holding that plaintiffs had standing to challenge the census count on constitutional grounds and that the Secretary's decision should be reviewed under the "arbitrary and capricious" standard of the Administrative Procedure Act. *City of New York v. U.S. Dep't of Commerce*, 713 F. Supp. 48, 52, 54 (E.D.N.Y. 1989) [*City of New York I*], reprinted at Pet. App. 121.[1]

In 1989, the district court approved a stipulation among the parties requiring the plaintiffs to withdraw their motion to enjoin the conduct of the census and the Secretary to reconsider *de novo* his 1987 decision against statistical adjustment. Pursuant to the stipulation, the Secretary in 1990 published a set of Guidelines for re-evaluating the adjustment question, under which, among other things, the burden of proving greater accuracy would be on those seeking an adjustment. *See* 55 Fed. Reg. 9,838 (1990). The district court subsequently held that a statistical adjustment would not in itself violate federal law and that the Guidelines were consistent with the stipulation and not unduly biased against adjustment. *City of New York v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 767, 770 (E.D.N.Y. 1990) [*City of New York II*], reprinted at Pet. App. 96.

After elaborately planning, conducting, and compiling the results of the actual census count in 1990, the Secretary undertook the agreed-upon process for determining whether to adjust the count by statistical methods. Based on a second survey of some 5,000 of the 5,000,000 census

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[1] We refer to the appendix to the petition in No. 94-1614 as "Pet. App."

blocks in the Nation, complex statistical methods were applied to produce estimates of the population that differed slightly from the count produced by the 1990 census—by 2.1% originally, by 1.6% after a subsequent correction (in 1993), though still with various biases and unproved but important assumptions inherent in the estimates. Then, after detailed consideration based on the differing views of numerous experts, the Secretary decided on July 15, 1991, that he would not replace the census-count results with the figures produced by the statistical sampling, noting in particular that the proposed statistical adjustment did *not* improve "distributive accuracy," *i.e.*, "getting most nearly correct the proportions of people in different areas." Pet. App. 146-47; *see City of New York II*, 739 F. Supp. at 769 [Pet. App. 114] (Guideline requiring that any adjustment be usable "at all levels"). While acknowledging an overall national undercount among certain populations, including minority groups, the Secretary decided that he would not "abandon a two hundred year tradition of how we actually count people" in favor of the proposed sample-based statistical adjustment. Pet. App. 138; *id.* at 135-415; 56 Fed. Reg. 33,582 (1991); *see City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 911, 916 n.12 (E.D.N.Y. 1993) [*City of New York III*], reprinted at Pet. App. 41; *see also* 58 Fed. Reg. 69, 73 (1993).

Plaintiffs again attacked the decision not to adjust the census. After consolidating the case with other cases from Florida and Georgia, the district court held a 13-day bench trial, hearing testimony from various experts. The court rejected plaintiffs' claims and upheld the Secretary's decision not to replace the actual count with a statistically based adjustment. *See City of New York III, supra.* The court found the Secretary's rationale for rejecting the adjustment reasonable on a host of grounds, summing up by quoting an expert who had supported adjustment: " 'reasonable statisticians could differ on this conclusion.' "

822 F. Supp. at 929 [Pet. App. 91]; *id.* at 917-31 [Pet. App. 61-95].

On appeal, a divided panel of the Second Circuit reversed. *City of New York v. U.S. Dep't of Commerce*, 34 F.3d 1114 (2d Cir. 1994) [*City of New York IV*], reprinted at Pet. App. 1. The court held that "heightened scrutiny" of the Secretary's census methodology was constitutionally required (a) under the one-person-one-vote apportionment decisions (*e.g., Wesberry v. Sanders*, 376 U.S. 1 (1964); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Karcher v. Daggett*, 462 U.S. 725 (1983)) and (b) because "the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups." 34 F.3d at 1128 [Pet. App. 33]; *see id.* at 1129, 1131 [Pet. App. 34, 39]. Applying what it described as "the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity" (*id.* at 1131 [Pet. App. 39-40]), the panel majority ruled that the Secretary's decision not to adjust the census (though a "choice . . . among imperfect alternatives") was unconstitutional, as not a good faith effort to achieve national numerical accuracy as nearly as practicable, unless the Secretary could prove on remand that the decision not to replace the census count with a statistical adjustment "furthers a governmental objective that is legitimate" and "is essential for the achievement of that objective." *Id.* at 1131 [Pet. App. 40].

Judge Timbers dissented, stating that he would follow the district court's decision upholding the Secretary's determination. He also pointed out that the panel majority's decision was in conflict with "[t]he only two other circuits that have ruled on this issue," *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992), and *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), both of which held that the Constitution

did not provide a basis for judicial invalidation of the Secretary's choice among reasonable alternative census methodologies. *See City of New York IV*, 34 F.3d at 1131-32 (Timbers, J., dissenting) [Pet. App. 40].

REASONS FOR GRANTING THE PETITIONS

The decision of the court of appeals should be reviewed for two reasons. First, it creates a conflict among the circuits on an issue of great and recurring national importance. Second, the decision is unjustified on the merits.

I. THE SECOND CIRCUIT'S DECISION CREATES A CONFLICT AMONG THE CIRCUITS ON AN ISSUE OF GREAT AND RECURRING IMPORTANCE.

The Second Circuit's application of heightened judicial scrutiny to the Secretary's census methodology squarely conflicts, as Judge Timbers observed, with decisions of the Seventh and Sixth Circuits, the only other courts of appeals that have addressed the issue presented. In *Tucker*, the Seventh Circuit thoroughly considered and rejected a challenge to the Secretary's refusal to undertake "a statistical adjustment to the census headcount." 958 F.2d at 1418. The court explained that (a) the disproportionate undercount of minorities, not being purposeful, afforded no basis for heightened judicial scrutiny (*id.* at 1413-14) and (b) the *Wesberry* apportionment doctrine furnished no such basis, because the question of accuracy in the census count was entirely different from the question of equal allocation of voters to electoral districts—not only conceptually but practically: whereas "[e]quality of voting power is an administrable standard, . . . [t]he plaintiffs' claim to a census adjustment invokes no judicially administrable standards. The plaintiffs are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical

adjustment to the census headcount." *Id.* at 1418. *Tucker* was explicitly followed by the Sixth Circuit in its subsequent rejection of a similar request for a judicial order compelling the Secretary to adopt an adjustment of the actual census count based on statistical sampling. *City of Detroit*, 4 F.3d at 1375-78.

The decisions of the Seventh and Sixth Circuits thus reject the very claim that the Second Circuit has held warrants heightened judicial scrutiny.[2] Yet the Second Circuit judgment would seem effectively to control the issue nationwide, as the Secretary makes a single national decision to adjust the census or not. With a clear split among the circuits, the issue presented should be subject to a binding national resolution only if that resolution comes from this Court.

The issue presented in these cases is a recurring one. The stringent constitutional standards announced by the Second Circuit will, if unreviewed, apply to the decisions by Congress and the Executive about how to conduct all future censuses, which under the Constitution must be conducted every ten years. U.S. Const., Art. I, Sec. 2, cl. 3. The Second Circuit's decision undoubtedly will provoke complex litigation no matter what choices the federal government makes about future census methodologies. *See, e.g.*, note 11, *infra*. This Court should not

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[2] The Seventh Circuit in *Tucker* phrased its conclusion in terms of the lack of a judicially enforceable right to invalidate the Secretary's census methodology. 958 F.2d at 1418, 1419. But because the court distinguished challenges "to some categorical judgment of inclusion or exclusion argued to be in violation of history, logic, and common sense" (*id.* at 1418), *Tucker*'s holding appears to be equivalently phrased as a determination that the Constitution is not violated by the Secretary's choice among reasonable alternative methodologies. In any event, the result of the Second Circuit decision in the present case is squarely to allow what both the Seventh and Sixth Circuits forbid: judicial invalidation of the Secretary's decision to stay with the actual count as the census methodology.

allow the government's decisions on the many policy and technical issues that determine census methodology to be made under the cloud of an unreviewed constitutional ruling imposing stringent, and unjustified, constraints on those decisions. Nor should the Court allow numerous governmental decisions outside the census context to be made under the cloud of the Second Circuit's novel invocation of heightened judicial scrutiny based entirely on disproportionate racial impact.

The choice of census methodology—now subject to the Second Circuit's new constitutional constraints, imposed in conflict with two other circuits—has important consequences. One set of consequences is representational. The census count directly affects the apportionment among the States of seats in the House of Representatives. U.S. Const., Art. I, Sec. 3, cl. 2; 2 U.S.C. § 2(a); 13 U.S.C. § 141(b). And the apportionment of state legislative seats also is widely based on the official federal census.[3] Even the current allocations of congressional and state-legislative seats, based on the 1990 census to which the Second Circuit's ruling directly applies, have been thrown into doubt: the adjustment originally calculated by the Secretary after the 1990 census would shift two congressional seats, from Wisconsin and

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[3] *See, e.g.*, Ala. Const. art. IX, § 198; Alaska Const. art. VI, § 3; Ariz. Rev. Stat. Ann. § 16-1102 (1994); Colo. Const. art. V, § 48; Conn. Const. art. III, § 6; Del. Code Ann. tit. 29, § 805 (1991); Ga. Const. art. III, § 2, ¶ 2; Haw. Rev. Stat. § 25-2 (1992); Ill. Const. art. IV, § 3; Ind. Const. art. IV, § 5; Iowa Const. art. III, § 34; Kan. Const. art. X, § 1; La. Const. art. III, § 6; Md. Const. art. III, § 5; Mass. Const. art. XIII; Mich. Const. art. 4, § 2; Mo. Const. art. III, § 2; Minn. Const. art. IV, § 3; Mont. Const. art. V, § 14; Neb. Const. art. III, § 5; N.H. Const. pt. 2, art. IX; N.J. Const. art. IV, § 2, ¶ 1; N.Y. Const. art. III, § 4; N.C. Const. art. II, § 3; Ohio Const. art. XI, § 2; Okla. Const. art. V, § 9A; Or. Const. art. IV, § 6; R.I. Const. art. VII, § 1; S.D. Const. art. III, § 5; Tex. Const. art. III, § 28; Utah Code Ann. § 36-1-1 (1953); Wash. Const. art. II, § 43; Wis. Const. art. IV, § 3; Wyo. Const. art. III, § 48.

Pennsylvania to Arizona and California. *City of New York IV*, 34 F.3d at 1122 [Pet. App. 17].

Substantial financial consequences also hinge on the official census, and hence on resolution of the uncertainty created by the Second Circuit's ruling. Dozens of federal programs allocate money to the States or their subdivisions based on the figures derived from the federal census. *See City of New York IV*, 34 F.3d at 1117 [Pet. App. 6]; *City of New York III*, 822 F.2d at 911, 918 n.17 [Pet. App. 45, 64]; GAO, *Formula Programs: Adjusted Census Data Would Redistribute Small Percentage of Funds to States* at 5, 16-19 (Nov. 1991) (one hundred such programs).[4] Although overall distributions of federal funds would not change dramatically in percentage terms under the particular adjustment at issue here (the population adjustments, after all, are small in percentage terms), the amounts of money that would be subtracted from or added to the allocations to various States under various programs are now, and can be expected to continue to be, substantial, especially as they occur year after year.[5] The Second Circuit's decision having these

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[4] *See, e.g.*, 24 C.F.R. § 570.307 (Community Development Block Grants); 42 U.S.C. § 5306(b)(1)(A)(i) (Community Development/Entitlement); 42 U.S.C. § 300x-7(a)(5)(B) (Community Mental Health Services); 20 U.S.C. § 2921(b) (Federal, State, and Local Partnerships for Educational Improvement); 24 C.F.R. § 791.402 (Housing Assistance Programs and Public and Indiana Housing Programs); 29 U.S.C. § 1572(a) (Job Training Partnership Act, Title IIA: Training Services for Disadvantaged Adult and Youth); 42 U.S.C. § 8623(a)(4) (Low-Income Home Energy Assistance); 42 U.S.C. §§ 702(c)(1)(B)(i), (ii), (Maternal and Child Health Services); 42 U.S.C. § 300w-1 (Preventive Health and Health Services); 42 U.S.C. § 1397f(a)(2)(C) (Social Services); 20 U.S.C. § 6333 (Strengthening and Improvement of Elementary and Secondary Schools); 23 U.S.C. § 104 (Surface Transportation Program).

[5] The GAO study cited in text estimated the reallocations for fiscal year 1991 of three of the 100 programs it identified as population based. For Federal Medicaid Allocations, 17 States would

effects on the budgets of state and local governments should not go unreviewed.

II. THE SECOND CIRCUIT'S APPLICATION OF HEIGHTENED JUDICIAL SCRUTINY TO THE SECRETARY'S CENSUS-COUNT DECISION RESTS ON NOVEL AND UNJUSTIFIED PRINCIPLES.

The Second Circuit decision warrants review not only because of the importance of the issue and the intercircuit conflict it creates, but because of the merits of the decision. The Second Circuit held that "heightened scrutiny" —which it described at one point as traditional strict scrutiny (*City of New York IV*, 34 F.3d at 1131 [Pet. App. 39-40])—applied to the Secretary's decision not to replace the actual census count with the results produced by a methodology based on statistical sampling. It rested that holding on two bases: the disproportionate effects of the census undercount on racial minorities; and the one-person-one-vote apportionment doctrine of *Wesberry* and its successors. The Second Circuit's decision cannot rest on either of these grounds under established constitutional doctrine.

A. The Second Circuit's reliance on disparate racial impact as a ground for heightened scrutiny (*City of New York IV*, 34 F.3d at 1129, 1131 [Pet. App. 33-34, 39]) appears to be directly contradicted by settled constitutional standards. Under *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), a constitutional claim of unlawful race discrimination is not made out by a showing of disparate racial impact, but requires proof of facial or purposeful discrimination. And knowledge of a disproportionate impact, while it may furnish evidence of, is simply not the same as discriminatory purpose. *See, e.g., Personnel Adm'r of Massachusetts v.*

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have lost well over $100 million in that year alone, while 23 States would have gained more than $40 million. GAO, *Formula Programs*, *supra*, at 24-25.

Feeney, 442 U.S. 256, 279 (1979) (government action must be taken " 'because of,' not merely 'in spite of' " its [racial] impact to raise a constitutional claim); *Arlington Heights*, 426 U.S. at 265-66.

In this case, the Second Circuit nowhere suggested that there was any hint of purposeful discrimination behind the Secretary's decision to follow consistent historical practice based on a host of patently good-faith, reasonable grounds for rejecting the proposed statistical adjustment. *See also Tucker*, 958 F.2d at 1413-14. The issue of race would seem, therefore, to drop out of this case under settled equal-protection doctrine. The Second Circuit pointed to no other doctrinal basis that supports its reliance on disparate impact as a justification for heightened judicial scrutiny.

B. The Second Circuit also relied on the *Wesberry* line of decisions as a justification for heightened judicial scrutiny of the Secretary's census-count decision. *City of New York IV*, 34 F.3d at 1125-29 [Pet. App. 26-35]. The court acknowledged in passing that "[t]here are, of course, differences between the present case and the *Wesberry* . . . line of cases." 34 F.3d at 1129 [Pet. App. 34]. But the court nevertheless announced that heightened scrutiny applied in this case, because the court wholly failed to recognize the nature and extent of those differences, as a conceptual, textual, precedential, and practical matter.

The *Wesberry* doctrine is concerned with equality in apportioning already-determined quantities. This case is concerned with accurate determination of the initial quantities. The conceptual difference is the difference between division, on the one hand, and counting or measurement, on the other. Thus, as the Seventh Circuit observed in *Tucker*, "this is [not] an apportionment case, or governed by those cases." 958 F.2d at 1415.[6]

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[6] *See also id.* at 1418 (because undercount disproportionately affects people who cannot or do not vote, "this is not a case about

As a textual matter, moreover, while the equal-apportionment issue is governed only by several (implied) equality commands of the Constitution (U.S. Const. Art. I, Sec. 2, cl. 2; Amends. 5, 14; *see Wesberry*, 376 U.S. at 4), the issue of the census count is addressed by a separate, specific clause of the Constitution, U.S. Const. Art. I, Sec. 2, cl. 3. That clause in terms provides for the census count to be conducted "in such Manner as [Congress] shall by Law direct."[7] Textually, then, the census-count question presented here, unlike the equal-apportionment question, is subject to an explicit vesting of discretion in Congress that at a minimum weighs strongly against the Second Circuit's borrowing of heightened scrutiny from the equal-apportionment doctrine. *Cf. United States Dep't of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992) (textual delegation to Congress even under Necessary and Proper Clause is reason for deference).

This Court's decisions have never applied heightened scrutiny to the Secretary's method of counting people for the census. *Wesberry*, *Kirkpatrick*, and *Karcher* all involved the decisions of *States* about the equal or unequal allocation of people into electoral districts. In *United States Dep't of Commerce v. Montana*, *supra*, and *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), this Court applied a principle of equal representation to the federal government. Both cases, however, involved the assignment among States of an already-fixed quantity: *Montana* involved the allocation among States of the 435 seats in the House of Representatives; *Franklin* involved the allocation of overseas federal employees to the States. Neither case involved judicial scrutiny of the accuracy of the federal government's count of people, which, indeed,

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depriving anybody of his right to vote or about diluting his voting power").

[7] Congress has in turn delegated substantial discretion to the Secretary of Commerce. *See* 13 U.S.C. §§ 141(a), 195.

Franklin recognized as a quite different question.[8] Moreover, even in an apportionment context, the Court in *Montana*, citing separation-of-powers and pragmatic concerns, specifically refused to transpose to the federal government the strict equality standard applied to the States in *Wesberry* and its successors. 112 S. Ct. at 1426, 1429.

There are also strong practical, institutional reasons for the judiciary in applying constitutional standards to distinguish the Secretary's census-count methodology—one that follows consistent historical practice—from "the much easier task of determining district sizes within State borders." *Montana*, 112 S. Ct. at 1429. An adjustment of the actual count based on statistical sampling raises a host of issues as to which there is no single clear "polestar" to "provide sufficient guidance" to courts (*ibid.*)—not only issues about required degrees of accuracy at national and subnational levels,[9] but also the complex technical judgments required in evaluating the assumptions, biases, and reliability of the range of possible statistical adjustments.[10] A choice of census methodology,

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[8] *Franklin*, 112 S. Ct. at 2776 ("even if appellees have standing to challenge the Secretary's decision to allocate, they do not have standing to challenge the accuracy of the data used in making that allocation").

[9] With respect to the basic choice of distributive accuracy in preference to overall national accuracy, see U.S. Pet. 16-17.

[10] The proposed adjustment at issue here, for example, presented serious questions on a number of scores: deficiencies in distributive accuracy (the adjustment may have been less accurate for 21-29 States), *City of New York III*, 822 F. Supp. at 922 [Pet. App. 74]; the uncertain accuracy of the post-enumeration survey (*id.* at 921-22 [Pet. App. 72-74]); the high degree of "imputation" of information required for the "matching" process essential to the adjustment (*id.* at 922-23 [Pet. App. 74-76]); the effect of biases, of the uncertain "homogeneity" assumption, and of the "smoothing" process underlying the adjustment (*id.* at 924, 926 [Pet. App. 79-84]); and the apparent non-robustness of the results, so that

unlike a state districting decision, is not "capable of being reviewed under a relatively rigid mathematical standard." *Ibid.* (footnote omitted). Applying heightened scrutiny to the Secretary's decision among reasonable alternative census methods would generate repeated and lengthy litigation over issues not readily amenable to judicial determination by a standard discernable from the Constitution. *Tucker*, 958 F.2d at 1418 ("The plaintiffs' claim to a census adjustment invokes no judicially administrable standards.").[11]

There are also policy reasons, beyond "technical" concerns, that legitimately weigh against any (judicially mandated) adoption of a statistical adjustment. For example, "any attempt to make a statistical adjustment to the mechanical headcount would, by injecting judgmental factors—and ones of considerable technical complexity to boot—open the census process to charges of political manipulation." *Tucker*, 958 F.2d at 1413. *See City of New York III*, 822 F. Supp. at 925-26 [Pet. App. 83]; Pet. App. 213-28. And displacement of the actual count by a sample-based adjustment could have an adverse

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reasonable changes in assumption would produce large changes in result (*ibid.*). *See also* Pet. App. 169-228; 58 Fed. Reg. at 74-75.

In 1993 the Secretary reiterated some of these points in deciding not to adjust the "intercensal" estimates: "In most statistical applications, we never know the true situation, and no model is perfect. Despite the extensive research, too many concerns remain about the level of bias; the estimate of the true population used as the target in loss function analyses; allocation of correlation bias; and whether the homogeneity assumption holds, given the levels of bias, to make a decision to adjust intercensal population estimates defensible across the board to all 44,055 substate areas." 58 Fed. Reg. 75.

[11] Once the issue of race is put aside, it is not clear why the Second Circuit's demand for equal accuracy in counting people would not condemn the conceded inaccuracies of the adjusted results at the subnational level (*see* page 4 & note 10, *supra*) any differently from the inaccuracies of the actual count at the national level.

effect on the census itself by diminishing the incentive of States and citizens to participate actively in the census, of census-takers to execute their responsibilities energetically, and of Congress to provide funding for the census. 822 F. Supp. at 927 [Pet. App. 85]; Pet. App. 228-38. All of these considerations undermine the Second Circuit's application of the *Wesberry* standard of heightened scrutiny to the quite different question of accuracy in the census count.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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Dated: June 1995

BEST AVAILABLE COPY

Nos. 94-1614, 94-1631 and 94-1985

In the Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

STATE OF WISCONSIN, PETITIONER

v.

CITY OF NEW YORK, ET AL.

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari in No. 94-1614 Filed April 3, 1995
Petition for Writ of Certiorari in No. 94-1631 Filed April 4, 1995
Petition for Writ of Certiorari in No. 94-1985 Filed June 5, 1995
Certiorari Granted September 27, 1995

STATE OF OKLAHOMA, PETITIONER

v.

CITY OF NEW YORK, ET AL.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 88-3474

THE CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1988		
11/3	1	Complaint filed, summons issued. (ent. 11-7-88) LCJ
11/3	2	Pltffs NOTICE OF MOTION returnable 11-17-88 at 9:30 A.M. For a Preliminary Injunction pursuant to Rule 65. (ent. 11-7-88) LCJ (attached exhibits) LCJ
11/3	3	Pltffs MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR PRELIMINARY INJUNCTION. (ent. 11-7-88) LCJ
11/3	4, 5 & 6	VOLUMES 1 thru 3. Exhibits In Support Of Pltffs Motion For A Preliminary Injunction, (ent. 11-7-88) LCJ
		• • • •
12/14	10	AMENDED COMPLAINT filed. 12-15-88rc
12/16	11	DEFT'S NOTICE OF MOTION ret. 12-29-88 (U.S. Dept. of Commerce, Bureau of the Census, C. William Verity, Robert Ortner and John G. Keane) for an order to stay discovery or for summary judgment. 12-19-88rc

DATE	NR.	PROCEEDINGS
1988		
12/16	12	DEFT'S NOTICE OF MOTION to dismiss action for want of jurisdiction filed. 12-19-88rc
12/16	13	DEFT'S, U.S. Dept. of Commerce, Bureau of the Census, C. William Verity, Roberr [*sic*] Ortner and John Keanes' NOTICE OF MOTION ret. 1/11/89 to dismiss complaint or to grant deft's summary judgment pursuant to Fed. R. Civ. P. 56. 12-19-88rc
12/16	14	Deft's Statement of Material Facts as to Which There is No Genuine Issue filed. 12-19-88rc
12/16	15	Deft's MEMORANDUM OF LAW In Support of Motion to Dismiss or for Summary Judgment and in Opossition [*sic*] to Pltff's Motion for Preliminary Injunction. 12-19-88rc
		* * * *
1/13	23	Statement Pursuant to Local Rule 3(g) in Opposition to Deft's motion to Dismiss. 1/13/89rc
		* * * *
1/13	25	Memorandum of Law in Support of Opposition to Deft's Motion for Summary Judgement. 1/13/89rc
		* * * *
1989		
1/26	28	Deft's Reply Memorandum in further Support of deft's motion for dismissal or for s/j. 1/27/89
		* * * *
2/14	30	STIPULATION by McLaughlin, J. dated 2/9/89 Regarding Participation of Donald K. Anderson. (see order for mor [*sic*] detail). 2/14/89rc

DATE	NR.	PROCEEDINGS
1989		
2/15	31	ORDER by McLaughlin, J. dtd 2/10/89. re: Deft's motion for an order dismissing the complaint. The Court is compelled to conclude that it must exercise its discretion and "require pltff(s) to supply by affidavits, further particularized allegations of fact deemed supportive (pltff's) standing. It is hereby ORDERED that pltffs submit on or before 2/24/89 affidavits or other competent evidence that support their allegations of fact on this issue of standing. The clerk shall make copies and serve them upon the parties. 2/15/89rc
		* * * *
3/10	39	Affidavits in Response to Court's 2/10/89 Order on the Issue of Standing. 3/13/89rc
3/10	40	Pltff's Memorandum in Response to the Court's Order of 2/10/89 on the Issue of Standing. 3/13/89rc
		* * * *
3/21	44	Affidavit in Response to Court's February 10, 1989 Order on the issue of Standing. 3/21/89rc
3/28	45	Deft's Memorandum in Response to Pltff's Memorandum in Response to Court's Order 2/10/89 on standing. 3/28/89rc
5/31	46	Plaintiffs Reply Memo in response to the Court's Order dtd 2/10/89 on the issue of standing, filed. (ent'd 4/489) mji
		* * * *

DATE	NR.	PROCEEDINGS
1989		
4/27	50	MEMORANDUM & ORDER dtd 4/21/89 by McLaughlin, J. denying deft's motion to dismiss the complaint and denying motion for summary judgment. Pltff's may renew motion for preliminary injunction upon the completion of discovery. c/m 4/27/89rc
		* * * *
4/21	—	Before McLaughlin, J. case called for motion. All present. Mr. Harte is admitted pro hac vice. Det. motion to dismiss argued. decision entered on the record. Motion denied. Defts motion for summary judgment denied. Pltffs to renew motion for preliminary injunction upon completion of discovery. 5/10/89rc
		* * * *
5/16	54	ANSWER filed. 5/17/89rc
		* * * *
6/7	64	STIPULATION/ORDER dtd 6/6/89 by McLaughlin, J. The return date for defts' motion for reconsideration is moved to 7/7/89; pltffs' memorandum in opposition to defts' motion for reconsideration shall be served on 6/23/89; and defts; reply memorandum in support of their motion for reconsideration shall be served on 7/6/89. 6/8/89rc
		* * * *
6/28	82	STANDARD REFERRAL ORDER dated 6/21/89 by McLaughlin, J. referring case to MAG. CADEN for all purposes and to hear and decide defts' motion (1) to strike witnesses from pltffs' witness list and (2) to compel interrogatory answers; and (3) to quash subpoenas. 6/28/89rc
		* * * *

DATE	NR.	PROCEEDINGS
1989		
7/18	98	STIPULATION AND ORDER by J. McLaughlin dtd 7/17/89 re: all pending motions, including pltff's pending Motion for a Preliminary Injunction, are withdrawn. (Ent'd 7/18/89) mr
7/17	—	Before J. McLaughlin—Case called. Counsel for both sides present. Pltff's motion for preliminary injunction is withdrawn. Stipulations placed on the record. Permanent injunction motion is still pending but should be resolved. (ent'd 7-20-89) nm
		* * * *
1990		
4/11	104	Pltff, THE CITY OF NEW YORK, NOTICE OF MOTION ret. 4-26-90 for an order, for a declaratory judgment and other relief. 4-11-90rc
		* * * *
4/11	108	Memorandum of Law in Support of pltff's Motion for a Supplemental Order to Enforce the Court's 7-17-89 order and for Declaratory Judgment. 4-11-90rc
4/19	109	NOTICE OF MOTION by State of Texas to Intervene as Pltff. 4-20-90rc
4/19	110	Memorandum in Support of Texas' Motion to Intervene. 4-20-90rc
		* * * *
5/4	112	Defts' Opposition to Pltff's Motion for A supplemental Order to Enforce Court's 7-17-89 Order and or Declaratory Judgment filed. Notice of Filing and Administrative Records Volums IA, IB, IC, ID, IIA, IIB attached. 5-4-90rc
		* * * *

DATE	NR.	PROCEEDINGS
1990		
5/24	122	the City of Pheonix's MOTION TO INTERVENE & REQUEST FOR ORAL ARGUMENT. 5-25-90RC
5/24	123	The City of Pheonix's Memorandum In Support of Its Motion to Intervene. 5-25-90rc
		* * * *
6/7	127	Supplemental Stipulation and Order dtd 6-5-90 by McLaughlin, J., amending the Stipulation and Order of 7/17/90 (see stipulation for further details). 6-7-90rc
6/8	128	MEMORANDUM & ORDER dtd 6-7-90 by McLaughlin, J., that the motion for declaratory judgment is hereby granted with the understanding that statutory and constitutional concerns will remain relevant in regard to the final form of statistical adjustment. The motion for a supplemental order is granted in part and denied in part, as set forth herein (see memo & order for further details). 6-11-90rc
		* * * *
7/13	130	ORDER dtd 7-13-90 by McLaughlin, J., granting motion to intervene. (see 5-24-90) With no further outstanding motions in this case, the federal file on this matter will, again be administratively closed. C/m 7-16-90rc
		* * * *
7/20	132	TEXAS' COMPLAINT IN INTERVENTION filed. 7-20-90rc
		* * * *
1991		
3/20	138	Letter dtd 3-13-91 from Michael S. Bokar, Senior Deputy Atty General for the State of

DATE	NR.	PROCEEDINGS
1991		
		New Jersey, confirming that the State of New Jersey agrees to be bound by the strip & Order of this Court dtd 7-17-89, filed. eod-3-20-91 el
2/15	139	Notice of motion by the state of New Jersey to intervene as a plaintiff filed. eod-4-8-91 el
2/15	140	Memo of law in support of motion to intervene, filed. eod-4-8-91 el
4/3	141	The cities of Cleveland, Denver, Inglewood, Ca., New Orleans, Oakland, Pasadena, Philadelphia, San Antonio, San Francisco and Broward County Florida's motion to intervene as pltffs in this action, ret. 4-18-91 filed. eod-4-8-91 el
4/3	142	Affidavit of Robert Rifkind in support of motion to intervene on behalf of Cleveland, etc., filed. eod-4-8-91 el
4/3	143	Affidavits in support of motion to intervene, filed. eod-4-8-91 el
4/3	144	Memo of law in support of motion to intervene, filed. eod-4-8-91 el
4/8	145	BY MCLAUGHLIN, J—Order dtd 3-28-91 granting the State of New Jersey's motion to intervene, filed. c/m. eod-4-8-91 el
4/8	146	Complaint in intervention of State of New Jersey, filed. eod-4-8-91 el
		* * * *
4/30	151	BY MCLAUGHLIN J.—Order dtd 4-26-91 (and received in the District Court today), that pursuant to the Court's order of 7-13-90, the motion of the City of Cleveland, Ohio, et al to intervene is hereby granted, filed. cm eod-4-30-91 el
		* * * *

DATE	NR.	PROCEEDINGS
1991		
5/28	155	Notice of motion by state of Florida to intervene as pltff, filed. el
5/28	156	Memo of law in support of motion to intervene, filed. el
		* * * *
6/19	161	BY MCLAUGHLIN C.J.—Order dtd 6-18-91 that pursuant to the Court's order dtd 7-13-90, the motion by the State of Florida to intervene is granted, filed. cm el
		* * * *
7/17	165	The State of Wisconsin's notice of motion and motion to intervene as a deft filed. el
7/17	166	Memo in support of Wisconsin's motion to intervene, filed. Both doc. 165 & 166 sent to chambers. el-
		* * * *
7/29	173	State of Washington's motion to appear amicus, filed. el
7/29	174	Memo in support of motion to appear amicus curiae, filed. el
		* * * *
8/8	177	Defts' motion ret. 8-22-91 for an order of dismissal. ent 8/23 mg (Memo of Law in support attached)
		* * * *
8/19	179	Motion by the State of Arizona to intervene as a party pltff with memo in support attached. ent 8-23 mg
8/19	180	Defts' motion to strike notices of depositions of Robert A. Mosbacher; Michael Darby; and Barbara E. Bryant ret 8/27/91. ent 8-23 mg
		* * * *

DATE	NR.	PROCEEDINGS
1991		
8/20	184	Pltff's memo in opposition to defts' motion to dismiss. ent 8-23 mg
8/22	185	Motion by the cities of Long Beach, Ca.; SanJose, Ca.; Baltimore, Md.; Boston, Ma.; Counties of Los Angeles and San Bernardino, Ca.; the District of Columbia; and the Navajo Nation ret 9/6/91 for an order permitting intervention as pltffs. ent 8-23 mg
		* * * *
9/3	203	Certified copy of MANDATE FROM USCA issued 8/29/91. Petition for Writ of Mandamus is denied without prejudice to renewal after the District Court rules on an application for a protective order, petitioners have one week from the date hereof for a stay of deposition-pending a decision on a motion to be filed forthwith for a protective order. Depositions are stayed for the period (up to 1 week) until petitioners apply to the District Court for a stay of deposition. Judge notified. USCA #91-3045. (EOD 9/4/91) mamc
9/3	204	Certified copy of MANDATE FROM USCA issued 8/28/91. Motion for stay pending disposition of petition for Writ of Mandamus is considered to be moot in light of this Court order of 8/28/91. Judge notified USCA #91-3045. (EOD 9/4/91) mamc
9/17	205	By Judge McLaughlin dated 8/1/91, ordered, that this case be referred to Mag. Ross for all pretrial purposes; to hear and decide discovery disputes. ent. 9/17/91 sy
9/17	206	By Judge McLaughlin dated 9/3/91, ordered, that Arizona motion to intervene as a plaintiff is granted. ent 9/17/91 sy

DATE	NR.	PROCEEDINGS
1991		
9/17	207	By Judge McLaughlin dated 9/3/91, ordered, that the City of Baltimore; Boston; Long Beach; San Jose; Los Angeles; San Bernardino; the District of Columbia; and the Navajo Nation motion to intervene as plaintiffs is granted. ent 9/17/91 sy
		* * * *
9/9	209	Notice of motion by state of New Mexico to intervene as a plaintiff. ent 9/17/91 sy
9/9	210	Memorandum of law in support of motion to intervene by state of New Mexico. ent 9/17/91 sy
		* * * *
9/17	213	By Judge McLaughlin dated 9/10/91, ordered, that the State of Wisconsin motion to intervene as defendant is granted. ent 9/17/91 sy
9/16	214	Copy of order by Mag. Ross dated 9/16/91, that defendants' motion for a protective order is granted only insofar as it seeks to preclude the depositions of Secretary Mosbacher, Under Secretary Darby and Director Bryant. ent 9/17/91 sy
		* * * *
9/22	217	Federal defendants' memorandum on adjusted population estimates. ent 9/23/91 sy Attached with the letter dated 9/20/91 from Thomas Millet to Judge McLaughlin.
		* * * *
9/23	221	By Judge McLaughlin dated 9/19/91, ordered, that the defendants' motion to dismiss is DENIED. ent 9/23/91 sy

DATE	NR.	PROCEEDINGS
1991		
9/23	222	By Judge McLaughlin dated 9/23/91, ORDERED, that defts' motion to move forthwith before the second circuit for a stay of depositions is GRANTED. ent 9/26/91 sy
9/24	223	ORDERED by Judge McLaughlin dated 9/24/91 that the state of New Mexico's motion to intervene as a plaintiff is GRANTED; and also GRANTED New Mexico's motion to appear pro hac vice. ent'd 10/8/91 sy
		* * * *
10/24	225	CERTIFIED COPY OF MANDATE from the USCA DENYING the Writ of Mandamus. Issued as mandate on 10-22-91. Ackn mailed. Judge notified. USCA # 91-3047. (EOD 10-24-91) mcg
10/10	226	ORDERED, by Mag. Ross dated 10/10/91 that plaintiff should be given access to the corrected redistricting tapes. ent'd 10/24 sy
10/15	227	City of Tucson's complaint in intervention filed. ent'd 10/24 sy
10/15	228	City of Tucson's memorandum in support of its motion to intervene filed. ent'd 10/24/91 sy
10/15	229	City of Tucson's motion to intervene and notice of motion filed ent'd 10/24/91 sy
		* * * *
10/23	233	Motion by State of Oklahoma to intervene as a defendant. ent'd 10/24 sy
10/23	234	Memorandum in support of motion to intervene by the State of Oklahoma. ent'd 10/24 sy

DATE	NR.	PROCEEDINGS
1991		
10/25	235	AN ORDER from USCA DENYING the governments motion for Stay of Depositions Pending Disposition for Petition for Writ of Certiorari filed at the USCA on 10-23-91. Judge notified. Ackn mailed. (EOD 10-25-91) mcg
		* * * *
11/14	254	Before Mag. Ross on 11/14 at 4:30. (1) Briefing schedule on motion for Mosbacher Dep: answer on 11/19; reply on 11/21. (2) Briefing schedule on motion to compel responses to questions concerning compilation of administrative record: answer by 11/22; reply by 11/2 (3) Parties meeting to negotiate defts' "contention interrogatories" (4) By 11/19, if possible, defts' to submit appropriate evidentiary basis for assertion of attorney/cient privilege in connection with 7/2/91 meeting; (5) Sear deposition may proceed, depending upon witness's availability, to be determined by deft's counsel.
11/15	255	Before Mag. Ross on 11/15 at 5:00, ORDERED, that plaintiffs' deposit of Fr. Wilkie may proceed, with its scope to be limited to the following issues: —any possible White House involvement with the adjustment decision and communications between the Dept. of Commerce and the White House or White House counsel on that issue; —Fr. Wilkie possible authorship of the Qs and As about which Dr. Plant was questioned; and—foundational questions concerning defts' assertion of the attorney-client privilege with respect to the 7/2/91 meeting. ent'd 11/18 smy

DATE	NR.	PROCEEDINGS
1991		
11/15	256	ORDERED, by Mag. Ross dated 11/15: As Judge McLaughlin previously rules, the issue of possible interference in the adjustment decision is an appropriate one for discovery at this stage of the case. The record developed during the Swanson deposition—both by Fr. Wilkie's testimony & by certain of the documents produce—clearly establish that Fr. Wilkie has personal knowledge on this issue having communicated concerning it not only with Swanson but also with Deputy White House Counsel John Schoritz and W.H. Counsel Boyden Grey. That, as defts point out, Fr. Willkie's communications on this issue were occasioned by the performance of his duties does not detruct from the appropriateness of discovery concerning those communications. Thus the evidence of Fr. Willkie's personal knowledge of this issue comply with the significance and appropriateness of the issue for exploration at this stage of the proceeding and the clear waiver of any privilege with regard to these particular communications (that is, between W.H. and commerce dept personnel concerning the adjustment issue) establish adequate necessity for his deposition on this limited issue, notwithstanding his senior position at the commerce dept. On the other hand, pltfs' have not established it. (See file) smy
		• • • •
11/25	264	Notice of MOTION by County of Hudson to intervene as plaintiff, returnable on 12/13/91 at 9:30. ent'd 11/27 smy (Attached mem. in support and aff. of Lawrence Berman)
		• • • •

DATE	NR.	PROCEEDINGS
1991		
11/26	266	Memorandum and ORDER by Mag. Ross dated 11/26/91, that the request for the deposition of Robert Mosbacher is DENIED. smy
11/26	267	Notice of appeal by deft of Mag. Ross's order of 11/15/91 filed, ent'd 12/3/91 smy
		* * * *
12/5	274A	Ordered, by Judge McLaughlin dtd 12/3/91, granting motion by Los Angeles to appear pro hac vice. ent'd 12/6 sy
		* * * *
12/5	275A	Ordered, by Judge McLaughlin dtd 12/3/91, that city of Tucson, Arizona motion to intervene as a plaintiff and to appear pro hac vice is granted. ent'd 12/6 sy
		* * * *
12/5	276A	Ordered, by Judge McLaughlin dtd 12/3/91, that the state of Oklahoma's motion to intervene as a deft is granted. ent'd 12/6 sy
1992		
		* * * *
1/21	282	Ordered, by Judge McLaughlin dtd 1/21/92, that the motion by County of Hudson, New Jersey to intervene as a plaintiff is granted. ent'd 1/24/92 sy
		* * * *
2/11	——	Administrative record received from Judry Subar with cover letter dtd 2/6/92 (in boxes) ent'd 2/11/92 sy
2/18	285	Order, by Judge McLaughlin dtd 2/18/92, that this Court will conduct an evidentiary hearing. ent'd 2/20/92 sy c/m

DATE	NR.	PROCEEDINGS
1992		
2/19	286	Before Judge McLaughlin on 2/19/92 for conference. Case called. All counsel present. Conf. held. Deposition's to completed by 4/24/92. Next conf. set for 2/21/92 at 11:00 by phone. Trial set for 5/11/92. Plaintiffs' witness list served by 3/2/92. Dft's witness list served by 3/9/92. Dft intervenor Wisconsin will serve pre-trial brief on question of legality of an adjustment. ent'd 2/28/92 sy
2/21	287	Before Judge McLaughlin on 2/21/92 for conf. by phone. Case called. Plaintiff's response to summary judgment motion of dfts due no later than 5/1/92. Pretrial submissions (due 5/1/92) limited to (1) pre-trial briefs, (2) documents categorized and marked by witness, (3) expert C.V.'s. Scope of trial will be broad; plaintiffs must prove abuse discretion. Dfts to respond to plaintiffs' evidence as they see fit. ent'd 2/28/92 sy
		• • • •
3/19	292	ORDER, by Judge McLaughlin dtd 3/16/92, that the request for State of Washington to appear as *amicus curiae* is granted to the limited extent that Washington may interpose an amicus brief re dfts' presently outstanding motion for summary judgment. The brief is to be filed no later than 4/6/92. The State of Washington may also interpose a pre-trial brief no later than 5/1/92 en'td 3/19 sy
3/19	293	Notice of Filing by dtfts re: recent decision by the U.S. Court of Appeals for the 7th Circuit. ent'd 3/24 sy
		• • • •

DATE	NR.	PROCEEDINGS
1992		
3/30	300	Answer in intervention of the State of Oklahoma, Ex Rel. Susan Loving, attorney general of Oklahoma to amended complaint. (rnt'd 3/30/92) sy
3/31	301	Memorndum of Law in SUPPORT of plaintiffs' Motion In Limine filed. (ent'd 3/31/92) sy Exhibits A-J attached.
3/31	302	Plaintiffs' notice of MOTION in limine for an order precludindg dfts from offering at trial evidence created after 7/15/91. (ent'd 4/1/92) sy
4/2	303	Plaintiffs' amended notice of motion in limine filed. (ent'd 4/3/92) sy
		* * * *
4/9	308	ORDER by Judge McLaughlin dtd 4/7/92, that the dft's motion in limine to preclude the trial testimony of Robert Mosbacher is *granted.* With one limitation, if, during the course of the hearing, the plaintiff can make a showing of bad faith sufficient to warrant the introduction of Mr. Mosbacher's testimony, they may, at that time, seek a reconsideration of this order. c/m (ent'd 4/9/92) sy
4/15	309	ORDER by Judge McLaughlin dtd 4/9/92, that the dfts' request for reconsideration of their motion to dismiss is DENIED. c/m (ent'd 4/15/92) sy
		* * * *
4/27	317	Motion by the Council of the Great City Schools to intervene as plaintiff. Motion returnable on 5/11/92 at 9:30. (ent'd 4/28/92) sy

DATE	NR.	PROCEEDINGS
1992		
4/27	318	Memorandum in support of motion to intervene filed by The Council of the Great City Schools. (ent'd 4/28/92) sy
		* * * *
4/30	321	Notice of joinder in opening trial memorandum and support of arguments presented by plaintiff City of N.Y. filed. (ent'd 5/4/92) sy
		* * * *
5/1	323	Order by Judge McLaughlin dtd 4/27/92, summarizing the Court orders that : (1) the plaintiffs' motion to preclude the dfts from introducing at trial documents created after July 15, 91 is DENIED; (2) the plaintiffs' motion for reconsideration of the Court's order of 3/24/92 is DENIED; and (3) *Florida House of Representatives v. Mosbacher* is hereby consolidated with this action. (ent'd 5/4/92) sy C/S
		* * * *
5/4	325	Trial brief of dft-intervenor The State of Oklahoma filed. (ent'd 5/4/92) sy
		* * * *
5/4	327	Plaintiffs' trial brief filed. (ent'd 5/5/92) sy
5/4	328	Plaintiffs' statement pursuant to rule 3(g) filed. (ent'd 5/5/92) sy
5/5	329	Dfts' trial brief filed. (ent'd 5/5/92) sy
5/5	330	Brief of dft-intervenor State of Wisconsin in opposition to statistical adjustment of the 1990 decennial census filed. (ent'd 5/5/92) sy
		* * * *
5/11	332	Ordered, by Judge McLaughlin dtd 5/6/92, consolidating case 88-cv-3474 and 92-cv-1566. Copies mailed. (ent'd 5/11/92) sy

DATE	NR.	PROCEEDINGS
1992		
5/11	333	Ordered, by Judge McLaughlin dtd 5/8/92, that the dfts' motion for summary judgment is denied. C/m (ent'd 5/11/92) sy
		* * * *
5/18	335	Order, by Judge McLaughlin dtd 5/12/92, that the Council of the Great City Schools' motion to intervene as a plaintiff is *granted*. C/M (ent'd 5/19/92) sy
5/19	336	Notice of adoption of plaintiffs' trial brief filed. (ent'd 5/19/92) sy
		* * * *
7/2	342	Dfts' proposed findings of fact and conclusion of law filed. (ent'd 7/2/92) sy
7/2	343	Dfts' post-trial brief filed. (ent'd 7/2/92) sy
7/3	344	Plaintiffs' proposed findings of fact and conclusion of law filed. (ent'd 7/7/92) sy
7/3	345	Plaintiffs' post-trial brief filed. (ent'd 7/7/92) sy
7/3	346	State of California's post-trial statements filed. (ent'd 7/7/92) sy
7/14	347	Dft-intervenor State of Oklahoma's *post-trial statement* filed. (ent'd 7/14/92) sy
7/30	348	Plaintiff County of Hudson's proposed findings of fact and conclusion of law filed. (ent'd 7/30/92) sy
7/30	349	Plaintiff Hudson County's post trial brief filed. (ent'd 7/30/92) sy
7/30	350	Dft's REPLY to plaintiff's post trial brief filed. (ent'd 7/30/92) sy
7/30	351	Plaintiffs' Post-trial reply brief filed. (ent'd 7/31/92) sy

DATE	NR.	PROCEEDINGS
1992		
7/31	352	Order by Judge McLaughlin dtd 7/20/92: (1) that the letters from both sides expanding upon and explaining certain representations made by defense counsel at trial are admitted; (2) PX 836, 649, 652, 780 are admitted; (3) PX 781 is admitted; (4) PX 782 & 783 are admitted; and (5) the depositions and deposition exhibit designations submitted by the parties are admitted with the exception of the Verity testimony discussed. So. Ordered. (entered 7/31/92) sy c/m
		* * * *
8/18	355	Letter dtd 8/17/92 from Michael Sitcov to Judge McLaughlin enclosing a copy of the recent decision in *City of Detroit, et al. v. Franklin, et al.* (Copy attached) (ent'd 8/20/92) sy
		* * * *
1991		
11/25	368	Complaint in intervention of County of Hudson filed. (ent'd 8/21/92) sy
2/7	369	Notice of Motion by dfts for summary judgment. Motion returnable on 3/27/92 at 9:30. (ent'd 8/21/92) sy
2/7	370	Memorandum of points and authorities in support of dfts' motion for summary judgment. (ent'd 8/21/92) sy
		* * * *
1993		
4/13	364	By Judge Joseph M. McLaughlin, dated April 13, 1993, MEMORANDUM & ORDER finding that the Secretary's decision not to adjust the 1990 census does not violate the APA, the

DATE	NR.	PROCEEDINGS
1993		
		Constitution, the Stipulation, or any statute; and the Court vacates the protective order governing the pltfs.' use of the computer tapes containing the adjusted block-level counts. The Court on the record before it, supplant the Secretary's decision. c/m (Entered on docket on 4/13/93) . . . tv
5/4	375	JUDGMENT: that the Court finds that the Secretary's decision not to adjust the 1990 census does not violate the APA, the Constitution, the Stipulation, or any statute; and, that the protective order governing the plaintiffs' use of the computer tapes containing the adjusted block-level counts is vacated. (Signed by Clerk of Court, Robert Heinemann, dated 5/3/93) ent'd 5/4/93) sy
		Case Closed.
7/6	376	NOTICE of Appeal filed by Plaintiffs/Appellants from the Judgment entered on 5/4/93. C of A filing fee paid/receipt #153080. AFF of service attached. C of A notified. (EOD 7/6/93) mcg
8/6	377	SCHEDULING ORDER from USCA filed. Record due 8/27/93. Appellant's brief due 9/3/93. Brief of Appellees due 10/4/93. Argument of the appeal to be heard 10/25/93. USCA #93-6183. mam
		* * * *
9/17		RECORD CERTIFIED & sent to the USCA. Ackn requested. (EOD 9/17/93) mcg
		* * * *
9/22	——	CERTIFIED & Send to the USCA a copy of (INDEX) for the first supplemental record. Ackn requested. (EOD 9/22/93) mcg

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 92-CV-1566

THE CITY OF ATLANTA, ET AL., PLAINTIFFS

v.

MOSBOCHER, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4/2/92	1	Original file, certified copy of transfer order and docket sheet received from District of Georgia, Northern District (jf) [Entry date 04/21/92]
5/11/92	—	ORDER, consolidating cases with lead case 88-cv-3474 (signed by Judge Joseph M. McLaughlin) (88-cv-3474—docket sheet) (sy) [Entry date 07/02/92]
5/11/92	—	Consolidated Member Case. Lead Case Number: 1cv88 3474 (sy) [Entry date 07/02/92]
5/11/92	—	Case closed (sy) [Entry date 07/02/92]
5/10/93	1	JUDGMENT for Bureau of the Census against City of Atlanta, Maynard Jackson: Ordered and Adjudged that the Court finds that the Secretary's decision not to adjust the 1990 census does not violate the APA, the Constitution, the Stipulation, or any statute; and the protective order governing pltffs' use of the computer tapes containing the adjusted block-level counts is vacated. (signed by Robert Heinemann) (dj) [Entry date 05/12/93]

DATE	NR.	PROCEEDINGS
6/24/93	2	Letter dated 6/17/93 from U.S. District Court for the Northern District of Georgia, Atlanta Division, to the Clerk, NY-E, stating that pursuant to the Court's order dated 2/24/92, they transferred their action to us. However, at the time the original record was not accessible and a duplicate was transmitted. Now, enclosed is the original file. (tv)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 92-CV-2037

FLORIDA HOUSE OF REPRESENTATIVES, ET AL.,
PLAINTIFFS

v.

MOSBACHER, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
5/1/92	1	Original file, certified copy of transfer order and docket sheet received from District of Florida, Tallahassee Division Northern Division (jf) [Entry date 05/07/92]
5/1/92	—	ORDER, consolidating cases with lead case 88-cv-3474 (docket sheet). (signed by Judge Joseph M. McLaughlin, dtd 4/27/92). See document #323 in 88-cv-3474. (sy) [Entry date 07/02/92]
5/1/92	—	Consolidated Member Case. Lead Case Number: 1cv88 3474 (sy) [Entry date 07/02/92]
5/1/92	—	Case closed (sy) [Entry date 07/02/92]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 93-6183

THE CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/8/93	Copy of district court docket entries and notice of appeal on behalf of Appellant City of NY, Appellant State of NY, Appellant Daniel E. Lungren, Appellant City Of Los Angeles, Appellant City Of Chicago, Appellant Dade County, Florida, Appellant U.S. Conference, Appellant National League, Appellant League Of United, Appellant NAACP, Appellant Marcella Maxwell, Appellant Donald H. Elliott, Appellant John Mack, Appellant Olga Morales, Appellant Timothy W. Wright, Appellant Raymond G. Romero, Appellant Antonio Gonzales, Appellant Athalie Range, Appellant State Of Texas, Appellant City Of Phoenix, Appellant State Of New Jersey, Appellant State Of Florida, Appellant City Of Cleveland, Appellant City Of Denver, Appellant City Of Inglewood, Appellant City Of New Orleans, Appellant City Of Oakland, Appellant City Of Pasadena, Appellant City Of Philadelphia, Appellant City Of San Antonio, Appellant City Of

DATE	PROCEEDINGS
	San Fran, Appellant Broward County, Appellant State Of Arizona, Appellant City Of Baltimore, Appellant City Of Boston, Appellant City Of Long Beach, Appellant City Of San Jose, Appellant Los Angeles County, Appellant San Bernadino County, Appellant District Of Columbia, Appellant Navajo Nation, Appellant State Of New Mexico, Appellant City Of Tucson, Appellant Council Of Great, Appellant City Of Atlanta, Appellant Maynard Jackson, Appellant Florida House, Appellant Florida State, Appellant Miguel A. De Grandy, Appellant Willye Dennis, Appellant Mario Diaz-Blancart, Appellant Charles Evans, Appellant Rodolfo Garcia, Appellant Bollowy L. Johnson, Appellant Alfred J. Lawson, Appellant Willis Logan, Appellant Johnnie McMillan, Appellant Alzo J. Reddick, Appellant Peter Rudy Wallace, Appellant T. K. Wetherell filed. [93-6183] Form C due on 7/16/93. Form D due on 7/16/93. (com)
7/16/93	Appellant City of NY, Appellant State of NY, Appellant Daniel E. Lungren, Appellant City Of Los Angeles, Appellant City Of Chicago, Appellant Dade County, Florida, Appellant U.S. Conference, Appellant National League, Appellant League Of United, Appellant NAACP, Appellant Marcella Maxwell, Appellant Donald H. Elliott, Appellant John Mack, Appellant Olga Morales, Appellant Timothy W. Wright, Appellant Raymond G. Romero, Appellant Antonio Gonzales, Appellant Athalie Range, Appellant State Of Texas, Appellant City Of Phoenix, Appellant State Of New Jersey, Appellant State Of Florida, Appellant City Of Cleveland, Appellant City Of Denver, Appellant City Of Inglewood, Appellant City Of New Orleans, Appellant City Of Oakland, Appellant City Of Pasadena, Appellant City Of Philadelphia, Appellant City Of San Antonio, Appellant City Of San

DATE	PROCEEDINGS
	Fran, Appellant Broward County, Appellant State Of Arizona, Appellant City Of Baltimore, Appellant City Of Boston, Appellant City Of Long Beach, Appellant City Of San Jose, Appellant Los Angeles County, Appellant San Bernadino County, Appellant District Of Columbia, Appellant Navajo Nation, Appellant State Of New Mexico, Appellant City Of Tucson, Appellant Council Of Great, Appellant City Of Atlanta, Appellant Maynard Jackson, Appellant Florida House, Appellant Florida State, Appellant Miguel A. De Grandy, Appellant Willye Dennis, Appellant Mario Diaz-Blancart, Appellant Charles Evans, Appellant Rodolfo Garcia, Appellant Bollowy L. Johnson, Appellant Alfred J. Lawson, Appellant Willis Logan, Appellant Johnnie McMillan, Appellant Alzo J. Reddick, Appellant Peter Rudy Wallace, Appellant T. K. Wetherell Form C filed, with proof of service. [93-6183] Form C deadline satisfied. (com)
7/16/93	Appellant City of NY, Appellant State of NY, Appellant Daniel E. Lungren, Appellant City Of Los Angeles, Appellant City Of Chicago, Appellant Dade County, Florida, Appellant U.S. Conference, Appellant National League, Appellant League Of United, Appellant NAACP, Appellant Marcella Maxwell, Appellant Donald H. Elliott, Appellant John Mack, Appellant Olga Morales, Appellant Timothy W. Wright, Appellant Raymond G. Romero, Appellant Antonio Gonzales, Appellant Athalie Range, Appellant State Of Texas, Appellant City Of Phoenix, Appellant State Of New Jersey, Appellant State Of Florida, Appellant City Of Cleveland, Appellant City Of Denver, Appellant City Of Inglewood, Appellant City Of New Orleans, Appellant City Of Oakland, Appellant City Of Pasadena, Appellant City Of Philadelphia, Appellant City Of San Antonio, Appellant City Of San Fran, Appellant Broward County,

DATE	PROCEEDINGS
	Appellant State Of Arizona, Appellant City Of Baltimore, Appellant City of Boston, Appellant City Of Long Beach, Appellant City Of San Jose, Appellant Los Angeles County, Appellant San Bernadino County, Appellant District Of Columbia, Appellant Navajo Nation, Appellant State Of New Mexico, Appellant City Of Tucson, Appellant Council Of Great, Appellant City Of Atlanta, Appellant Maynard Jackson, Appellant Florida House, Appellant Florida State, Appellant Miguel A. De Grandy, Appellant Willye Dennis, Appellant Mario Diaz-Blancart, Appellant Charles Evans, Appellant Rodolfo Garcia, Appellant Bollowy L. Johnson, Appellant Alfred J. Lawson, Appellant Willis Logan, Appellant Johnnie McMillan, Appellant Alzo J. Reddick, Appellant Peter Rudy Wallace, Appellant T. K. Wetherell Form D filed, with proof of service. [93-6183] Form D deadline satisfied. (com)
8/4/93	Scheduling order #1 filed. Record on appeal due on 8/27/93. Appellant's brief and appendix due on 9/3/93. Appellee's brief due on 10/4/93. Argument as early as week of 10/25/93. (Pre-Argument Conference scheduled for 8/18/93 @ 3:45 pm). (coc)
8/13/93	Appellant State of NY motion to extend time to file brief and appendix FILED (w/pfs). [423941-1] (ond)
8/18/93	New scheduling order number #2 filed. New record on appeal due date is 9/17/93. New appellant's brief due date is 9/24/93. New appellee's brief due date is 10/25/93. New argument week as early as 11/15/93. (ond)
8/25/93	Order FILED MOOTING motion for extended time; in light of the scheduling order dated 18 August 1993 [423941-1] by Appellant State of NY, on motion dated 8/13/93. (ond)

DATE	PROCEEDINGS
9/22/93	Notice of appearance form on behalf of Peter C. Anderson, Esq., received. (Orig. to Calendar) (rsk)
9/22/93	Notice of appearance form on behalf of Gretchen A. Harris, Esq., received. (Orig. to Calendar) (rsk)
9/23/93	The CAPTION PAGE for this appeal has been AMENDED. (com)
9/23/93	Record on appeal index in lieu of record filed, 88-cv-3474, 92-cv-1566, 92-cv-2037. (ond)
9/23/93	First supplemental index in lieu of supplemental record filed. (ond)
9/24/93	The CAPTION PAGE for this appeal has been AMENDED. (PER KB INSTRUCTION) (coa)
9/24/93	Appellants City of NY, State of NY, City Of Los Angeles, City Of Chicago, Dade County, Florida, U.S. Conference, National League, League Of United, NAACP, Marcella Maxwell, Donald H. Elliott, John Mack, Olga Morales, Timothy W. Wright, Raymond G. Romero, Antonio Gonzales, Athalie Range, State Of Texas, City Of Phoenix, State Of New Jersey, State Of Florida, City Of Cleveland, City Of Denver, City Of Inglewood, City Of New Orleans, City Of Oakland, City Of Pasadena, City Of Philadelphia, City Of San Antonio, City Of San Fran, Broward County, State Of Arizona, City Of Baltimore, City Of Boston, City Of Long Beach, City Of San Jose, Los Angeles County, District Of Columbia, Navajo Nation, State Of New Mexico, City Of Tucson, Council Of Great, City Of Atlanta, Maynard Jackson, Florida House, Florida State, Miguel A. De Grandy, Willye Dennis, Rodolfo Garcia, Alfred J. Lawson, Willis Logan, Johnnie McMillan, Alzo J. Reddick, Peter Rudy Wallace, T. K. Wetherell, Mario Diaz-Balart, San Bernardino, Bollowy L. "Bo" Johnson,

DATE	PROCEEDINGS
	Charles Evans, San Bernardino County brief FILED with proof of service. (ond)
9/24/93	Appellants City of NY, State of NY, City Of Los Angeles, City Of Chicago, Dade County, Florida, U.S. Conference, National League, League Of United, NAACP, Marcella Maxwell, Donald H. Elliott, John Mack, Olga Morales, Timothy W. Wright, Raymond G. Romero, Antonio Gonzales, Athalie Range, State Of Texas, City Of Phoenix, State Of New Jersey, State Of Florida, City Of Cleveland, City Of Denver, City Of Inglewood, City Of New Orleans, City Of Oakland, City Of Pasadena, City Of Philadelphia, City Of San Antonio, City Of San Fran, Broward County, State Of Arizona, City Of Baltimore, City Of Boston, City Of Long Beach, City of San Jose, Los Angeles County, District Of Columbia, Navajo Nation, State Of New Mexico, City Of Tucson, Council Of Great, City Of Atlanta, Maynard Jackson, Florida House, Florida State, Miguel A. De Grandy, Willye Dennis, Rodolfo Garcia, Alfred J. Lawson, Willis Logan, Johnnie McMillan, Alzo J. Reddick, Peter Rudy Wallace, T. K. Wetherell, Mario Diaz-Balart, San Bernardino, Bollowy L. "Bo" Johnson, Charles Evans joint appendix filed w/pfs. (ond)
9/24/93	Notice of appearance form on behalf of Mark B. Stern Esq., received. (Orig. to Calendar) (rsk)
9/24/93	Notice of appearance form on behalf of Peter Zimroth Esq., received. (Orig. to Calendar) (rsk)
9/27/93	Letter regarding oral argued received, cc: to calendar. (ond)
9/27/93	Notice of appearance form on behalf of Peter C. Anderson, Esq., received. (Orig. to Calendar) (rsk)
10/12/93	Appellees Donald K. Anderson, State Of Oklahoma, State Of Wisconsin, Richard W. Riley, Federico

DATE	PROCEEDINGS
	Pena, Robert B. Reich, Henry Cisneros, Donna E. Shalala, Michael Espy, William J. Clinton, Barbara Everitt Bryant, Bureau Of Census, Michael R. Darby, Ronald H. Brown, U.S. DOC motion to extend time to file brief and appendix FILED (w/pfs). [443416-1] (ond)
10/20/93	Order FILED GRANTING motion for extended time [443416-1] by Appellee Donald K. Anderson, State Of Oklahoma, State Of Wisconsin, Richard W. Riley, Federico Pena, Robert B. Reich, Henry Cisneros, Donna E. Shalala, Michael Espy, William J. Clinton, Barbara Everitt Bryant, Bureau Of Census, Michael R. Darby, Ronald H. Brown, U.S. DOC, endorsed on motion form dated 10/12/93. Extended appellee's brief due date is 11/8/93. Extended argument week as early as 11/22/93 (ond)
11/8/93	Appellee State Of Oklahoma, Appellee State Of Wisconsin brief filed with proof of service. (ond)
11/9/93	Appellees Donald K. Anderson, Richard W. Riley, Federico Pena, Robert B. Reich, Henry Cisneros, Donna E. Shalala, Michael Espy, William J. Clinton, Barbara Everitt Bryant, Bureau Of Census, Michael R. Darby, Ronald H. Brown, U.S. DOC brief filed with proof of service. (ond)
11/10/93	Proposed for argument the week of 1/3/94. (car)
11/16/93	Appellants T. K. Wetherell, Peter Rudy Wallace, Alzo J. Reddick, Johnnie McMillan, Willis Logan, Alfred J. Lawson, Bollowy L. "Bo" Johnson, Rodolfo Garcia, Charles Evans, Mario Diaz-Balart, Willye Dennis, Miguel A. De Grandy, Florida State, Florida House, Maynard Jackson, City Of Atlanta, Council Of Great, People of State, County Of Hudson, City Of Tucson, State Of New Mexico, Navajo Nation, District Of Columbia, ant San

DATE	PROCEEDINGS
	Bernardino, Los Angeles County, City Of San Jose, City Of Long Beach, City Of Boston, City Of Baltimore, State Of Arizona, Broward County, City Of San Fran, City Of San Antonio, City Of Philadelphia, City Of Pasadena, City Of Oakland, City Of New Orleans, City Of Inglewood, City Of Denver, City Of Cleveland, State Of Florida, State Of New Jersey, City Of Phoenix, State Of Texas, Athalie Range, Antonio Gonzales, Raymond G. Romero, Timothy W. Wright, Olga Morales, John Mack, Donald H. Elliott, Marcella Maxwell, NAACP, League Of United, National League, U.S. Conference, Dade County, Florida, City Of Chicago, City Of Los Angeles, State of NY, City of NY, motion to extend time to file reply brief FILED (w/pfs). [456743-1] (ond)
12/1/93	Set for argument on 1/5/94. [93-6183] (car)
12/6/93	Appellant T. K. Wetherell, Appellant Peter Rudy Wallace, Appellant Alzo J. Reddick, Appellant Johnnie McMillan, Appellant Willis Logan, Appellant Alfred J. Lawson, Appellant Bollowy L. "Bo" Johnson, Appellant Rodolfo Garcia, Appellant Charles Evans, Appellant Mario Diaz-Balart, Appellant Willye Dennis, Appellant Miguel A. De Grandy, Appellant Florida State, Appellant Florida House, Appellant Maynard Jackson, Appellant City Of Atlanta, Appellant Council Of Great, Appellant City Of Tucson, Appellant State Of New Mexico, Appellant Navajo Nation, Appellant District Of Columbia, Appellant San Bernardino, Appellant Los Angeles County, Appellant City Of San Jose, Appellant City Of Long Beach, Appellant City Of Boston, Appellant City Of Baltimore, Appellant State Of Arizona, Appellant Broward County, Appellant City Of San Fran, Appellant City Of San Antonio, Appellant City Of Philadelphia, Appellant City Of Pasadena, Appellant City

DATE	PROCEEDINGS
	Of Oakland, Appellant City Of New Orleans, Appellant City Of Inglewood, Appellant City Of Denver, Appellant City Of Cleveland, Appellant State Of Florida, Appellant State Of New Jersey, Appellant City Of Phoenix, Appellant State Of Texas, Appellant Athalie Range, Appellant Antonio Gonzales, Appellant Raymond G. Romero, Appellant Timothy W. Wright, Appellant Olga Morales, Appellant John Mack, Appellant Donald H. Elliott, Appellant Marcella Maxwell, Appellant NAACP, Appellant League Of United, Appellant National League, Appellant U.S. Conference, Appellant Dade County, Florida, Appellant City Of Chicago, Appellant City Of Los Angeles, Appellant State of NY, Appellant City of NY reply brief received. Problem: awaiting motion from calendar.
12/7/93	Order FILED GRANTING motion for extended time [456743-1] by Appellant T. K. Wetherell, Peter Rudy Wallace, Alzo J. Reddick, Johnnie McMillan, Willis Logan, Jr., Alfred J. Lawson Jr., Bollowy L. "Bo" Johnson, Rodolfo Garcia Jr., Charles Evans, Mario Diaz-Balart, Willye Dennis, Miguel A. De Grandy, Florida State, Florida House, Maynard Jackson, City Of Atlanta, Council Of Great, People of State, County Of Hudson, City Of Tucson, State Of New Mexico, Navajo Nation, District Of Columbia, San Bernardino, Los Angeles County, City Of San Jose, City Of Long Beach, City Of Boston, City Of Baltimore, State Of Arizona, Broward County, City Of San Fran, City Of San Antonio, City Of Philadelphia, City Of Pasadena, City Of Oakland, City Of New Orleans, City Of Inglewood, City Of Denver, City Of Cleveland, State Of Florida, State Of New Jersey, City Of Phoenix, State Of Texas, Athalie Range, Antonio Gonzales, Raymond G. Romero, Timothy W. Wright III, Olga Morales, John Mack, Donald H.

DATE	PROCEEDINGS
	Elliott, Marcella Maxwell, NAACP, League Of United, National League, U.S. Conference, Dade County, Florida, City Of Chicago, City of Los Angeles, State of NY, City of NY, endorsed on motion form dated 11/16/93. Extended appellant's reply brief due on 12/6/93. (cao)
12/7/93	Appellants T. K. Wetherell, Peter Rudy Wallace, Alzo J. Reddick, Johnnie McMillan, Willis Logan, Alfred J. Lawson, Bollowy L. "Bo" Johnson, Rodolfo Garcia, Charles Evans, Mario Diaz-Balart, Willye Dennis, Miguel A. De Grandy, Florida State, Florida House, Maynard Jackson, City Of Atlanta, Council Of Great, City Of Tucson, State Of New Mexico, District Of Columbia, San Bernardino, Los Angeles County, City Of San Jose, City Of Long Beach, City Of Boston, City Of Baltimore, State Of Arizona, Broward County, City Of San Fran, City Of San Antonio, City Of Philadelphia, City Of Pasadena, City Of Oakland, City Of New Orleans, City Of Inglewood, City Of Denver, City Of Cleveland, State Of Florida, State Of New Jersey, City Of Phoenix, State Of Texas, Athalie Range, Antonio Gonzales, Raymond G. Romero, Timothy W. Wright, Olga Morales, John Mack, Donald H. Elliott, Marcella Maxwell, NAACP, League Of United, National League, U.S. Conference, Dade County, Florida, City Of Chicago, City Of Los Angeles, State of NY, City of NY reply brief filed with proof of service. Satisfy appellant's reply brief due. (cao)
1/5/94	Case heard before Timbers, Kearse, Leval, C.JJ. (TAPE: 101 & 102) (cag)
1/13/94	Record on appeal after index filed. (12 volumes) (ona)
1/13/94	First Supplemental Record on appeal after index filed. (ona)

DATE	PROCEEDINGS
1/13/94	First supplemental record on appeal after index filed. (ona)
2/18/94	Letter dated 2/18/94 received from New York City Law Department, in which David B. Goldin, Esq. advises the court of the inadvertant [*sic*] omission of the City of Houston as plaintiffs-appellants in the existing caption. Copy to Systems. (onw)
2/18/94	Letter dated 2/18/94 received from NYC Law Department, in which David B. Goldin advises of need for further correction as to existing caption. Copy to Systems. (onw)
2/22/94	The CAPTION PAGE for this appeal has been AMENDED. (unv)
3/1/94	The CAPTION PAGE for this appeal has been AMENDED. (unv)
3/8/94	Appellee U.S. DOC 28(J) letter received. (cc: panel) (ona)
8/8/94	Judgment of the district court is VACATED, AND THE MATTER IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION by published signed opinion filed per Judge Kearse. (ono)
8/8/94	Judgment filed. (ono)
8/8/94	Judge Timbers DISSENTING in a separate opinion filed. (ono)
8/12/94	Appellant U.S. Conference motion to extend time to file petition for rehearing en banc until 21 September 1994 FILED (w/pfs). [551453-1] (ond)
8/15/94	Appellee State Of Wisconsin motion to extend time to file petition for rehearing en banc and to include 21 September 1994 FILED (w/pfs). [551456-1] (ond)

DATE	PROCEEDINGS
8/17/94	Appellee State Of Oklahoma motion to extend time to file petition for rehearing en banc 21 September 1994 FILED (w/pfs). [551925-1] (ond)
8/19/94	Order FILED GRANTING motion for extended time to file petition for rehearing and suggestion en banc until 21 September 1994 [551453-1] by Appellant U.S. Conference, endorsed on motion form dated 8/12/94, ALK, CJ. (ond)
8/19/94	Order FILED GRANTING motion for extended time to file petition for rehearing and suggestion en banc until 21 September 1994 [551456-1] by Appellee State Of Wisconsin, endorsed on motion form dated 8/15/94, ALK, CJ. (ond)
8/19/94	Order FILED GRANTING motion for extended time to file petition for rehearing and suggestion en banc until 21 September 1994 [551925-1] by Appellee State Of Oklahoma, endorsed on motion form dated 8/17/94, ALK, CJ. (ond)
8/22/94	Appellee State Of Wisconsin Petition for rehearing and, petition for rehearing in banc [553163-2] with proof of service filed. (ond)
8/22/94	Appellants T. K. Wetherell, Peter Rudy Wallace, Alzo J. Reddick, Johnnie McMillan, Willis Logan, Alfred J. Lawson, Bollowy L. "Bo" Johnson, Rodolfo Garcia, Charles Evans, Mario Diaz-Balart, Willye Dennis, Miguel A. DeGrandy, Florida State, Florida House, Maynard Jackson, City Of Atlanta, Council Of Great, People of State, County Of Hudson, City Of Tucson, State Of New Mexico, Navajo Nation, District Of Columbia, San Bernardino, Los Angeles County, City Of San Jose, City Of Long Beach, City Of Boston, City Of Baltimore, State Of Arizona, Broward County, City Of San Fran, City Of San Antonio, City Of Philadelphia, City Of Pasadena, City Of Oakland, City Of New Orleans, City Of Inglewood, City Of Denver, City

DATE	PROCEEDINGS
	Of Cleveland, State Of Florida, State Of New Jersey, City Of Phoenix, State Of Texas, Athalie Range, Antonio Gonzales, Raymond G. Romero, Timothy W. Wright, Olga Morales, John Mack, Donald H. Elliott, Marcella Maxwell, NAACP, League Of United, National League, U.S. Conference, Dade County, Florida, City Of Chicago, City Of Los Angeles, State of NY, City of NY, City of Houston, Jerry Alan Wood, Carolyn Sue Lopez, itemized and verified bill of costs received. (ond)
9/20/94	Appellee State Of Oklahoma petition for rehearing received. Problem: Printing type is Point 12 proportional. (ag42)
9/21/94	Appellee State Of Oklahoma Petition for rehearing with suggestion of rehearing in banc [563734-2] with proof of service filed. (ag42)
9/22/94	Letter received from U.S. Dept. of Justice in regards to not filing a petition for rehearing. (ag42)
10/31/94	"IT IS HEREBY ORDERED that no costs are awarded at this time. In the event that plaintiffs ultimately prevail on the merits of their claims, the district court may award them the costs of the present appeal." (Hons. WHT, ALK & PNL, CJJs) (For the Court: AH) (ag42)
11/1/94	Certified copy of the Order not Awarding Costs at this time, dated 10/31/94, issued to the district court. (ag42)
12/12/94	Order FILED DENYING petition for REHEARING [563734-1] and petition for rehearing in banc [563734-2] by Appellee State Of Oklahoma. (ag42)
1/4/95	Order FILED DENYING petition for REHEARING [553163-1] and petition for rehearing in banc [553163-2] by Appellee State Of Wisconsin. (ag41)
1/13/95	Judgment MANDATE ISSUED. (ag41)

DATE	PROCEEDINGS
1/20/95	Mandate receipt returned from the district court. (ren)
3/30/95	Letter from Supreme Court informing the of extension of time to file petition for writ of certiorari received (ag41)
4/11/95	Notice of filing petition for writ of certiorari for Appellant City Of Oakland dated 14 April 1995 filed. Supreme Ct.#: 94-1631. (ag41)
4/28/95	Letter received from Clayton R. Higgins, Jr., dated April 25, 1995. Indicating, the application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on April 25, 1995, extended the time to and including June 3, 1995. (ag43)
6/9/95	Notice of filing petition for writ of certiorari for Appellee U.S. DOC dated 5 June 1995 filed. Supreme Ct.#: 94-1985. (ag41)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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88 Civ. 3474 (JMcL)

THE CITY OF NEW YORK, THE STATE OF NEW YORK, THE PEOPLE OF THE STATE OF CALIFORNIA *Ex Rel.* JOHN K. VAN DE KAMP, ATTORNEY GENERAL, THE CITY OF LOS ANGELES, THE CITY OF CHICAGO, THE CITY OF HOUSTON, DADE COUNTY, FLORIDA, THE U.S. CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MARCELLA MAXWELL, DONALD H. ELLIOTT, JOHN MACK, OLGA MORALES, TIMOTHY W. WRIGHT III, RAYMOND G. ROMERO, ANTONIO GONZALEZ, ATHALIE RANGE, JERRY ALAN WOOD, and CAROLYN SUE LOPEZ, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF COMMERCE, C. WILLIAM VERITY, as Secretary of the United States Department of Commerce, ROBERT ORTNER, as Under Secretary for Economic Affairs of the United States Department of Commerce, BUREAU OF THE CENSUS, JOHN G. KEANE, as Director of the Bureau of the Census, RONALD W. REAGAN, as President of the United States, and DONNALD K. ANDERSON, as Clerk of the United States House of Representatives, DEFENDANTS

AMENDED COMPLAINT

INTRODUCTION

1. This is an action under the Constitution and laws of the United States challenging the refusal of the federal government to conduct a fairer and more accurate decennial census in 1990.

2. The decennial census is one of the fundamental instruments for allocating political power in this country. It determines the apportionment of representatives in Congress and in state legislatures, the allocation of Electoral College votes in presidential elections, and the distribution among states and localities of billions of dollars of federal funds for housing, education, transportation, environmental protection, and other services. If the census is inaccurate, the apportionment of legislatures, the allocation of Electoral College votes, and the distribution of funds are necessarily distorted.

3. In 1990, the defendants will conduct the 21st decennial census. It is a certainty that, as now planned, the census will seriously undercount Blacks, Hispanics, and members of the disadvantaged groups. It will thus also seriously undercount the states and localities in which a disproportionate number of these individuals live.

4. Acknowledging the inevitability of this undercount, the Census Bureau determined in 1987 that it would prepare to use statistical techniques to correct the undercounts. Indeed, the Bureau began the preparations necessary to correct the 1990 census.

5. But the Commerce Department, which oversees the Bureau, then reversed the decision, prohibiting the Bureau from any further preparations for correction. The Commerce Department's action was not based on any legitimate technical or operational considerations, and the plaintiffs now ask the Court to require the defendants to correct in 1990.

6. This action arises under Article I, Section 2 of the Constitution; the Fifth and Fourteenth Amendments to

the Constitution; the laws of the United States relating to the census and the apportionment of representatives in Congress, 13 U.S.C. §§ 1 *et seq.* and 2 U.S.C. § 2a; and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

JURISDICTION AND VENUE

7. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337, and 1361, and 5 U.S.C. § 702. Declaratory relief is authorized by 28 U.S.C. §§ 2201-2202. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

8. Plaintiffs The State of New York and The State of California are entitled to a number of representatives in Congress pursuant to Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, based on "the whole number of persons" in the state. They are referred to collectively as the "plaintiff states"

9. Plaintiff The City of New York is a municipal corporation organized under the laws of the State of New York.

10. Plaintiff The City of Los Angeles is a municipal corporation and charter city organized under the laws of the State of California.

11. Plaintiff The City of Chicago is a municipal corporation organized under the laws of the State of Illinois.

12. Plaintiff The City of Houston is a municipal corporation organized under the laws of the State of Texas.

13. Plaintiff Dade County, Florida is a political subdivision of the State of Florida. Plaintiffs The City of New York, The City of Los Angeles, The City of Chicago, The City of Houston, and Dade County, Florida, are referred to collectively as the "plaintiff municipalities."

14. Plaintiff The U.S. Conference of Mayors is an organization of approximately 840 member mayors of cities with populations exceeding 30,000.

15. Plaintiff The National League of Cities is a membership organization representing approximately 16,000 cities through direct membership and membership in 49 affiliated state municipal leagues.

16. Plaintiff The League of United Latin American Citizens is the nation's largest and oldest Hispanic membership organization, serving the needs of Hispanic communities throughout the country.

17. Plaintiff The National Association for the Advancement of Colored People is the nation's largest and oldest civil rights membership organization, with more than 2200 branches, working for the political, social, and economic equality of all minorities.

18. Plaintiff Marcella Maxwell is a citizen of the United States, and a voter and taxpayer in the State and City of New York, residing in the 10th Congressional District, the 23rd State Senatorial District, and the 44th State Assembly District.

19. Plaintiff Donald H. Elliott is a citizen of the United States, and a voter and taxpayer in the State and City of New York, residing in the 13th Congressional District, the 25th State Senatorial District, and the 52nd State Assembly District.

20. Plaintiff John Mack is a citizen of the United States, and a voter and taxpayer in the State of California and the City of Los Angeles, residing in the 28th Congressional District, the 30th State Senatorial District, and the 49th State Assembly District.

21. Plaintiff Olga Morales is a citizen of the United States, and a voter and taxpayer in the State of California and the City of Los Angeles, residing in the 25th Congressional District, the 23rd State Senatorial District, and the 55th State Assembly District.

22. Plaintiff Timothy W. Wright III is a citizen of the United States, and a voter and taxpayer in the State of Illinois and the City of Chicago, residing in the 1st Congressional District, the 13th State Senatorial District, and the 25th State Representative District.

23. Plaintiff Raymond G. Romero is a citizen of the United States, and a voter and taxpayer in the State of Illinois and the City of Chicago, residing in the 9th Congressional District, the 2nd State Senatorial District, and the 3rd State Representative District.

24. Plaintiff Antonio Gonzalez is a citizen of the United States, and a voter and taxpayer in the State of Florida and the City of Miami, residing in the 17th Congressional District, the 33rd State Senatorial District, and the 109th State Representative District.

25. Plaintiff Athalie Range is a citizen of the United States, and a voter and taxpayer in the State of Florida and the City of Miami, residing in the 17th Congressional District, the 37th State Senatorial District, and the 101st State Representative District.

26. Plaintiff Jerry Alan Wood is a citizen of the United States, and a voter and taxpayer in the State of Texas and the City of Houston, residing in the 18th Congressional District, the 15th State Senatorial District, and the 137th State Representative District.

27. Plaintiff Carolyn Sue Lopez is a citizen of the United States, and a voter and taxpayer in the State of Texas and the City of Houston, residing in the 18th Congressional District, the 15th State Senatorial District, and the 143rd State Repersentative District.

28. Defendant United States Department of Commerce is a department of the federal government.

29. Defendant C. William Verity is the Secretary of the United States Department of Commerce. The Secretary is responsible under 13 U.S.C. § 141 for taking the decennial census, and has delegated that responsibility to the Director of the Bureau of the Census. The delegation

was made pursuant to Department Organization Order 35-2A of the United States Department of Commerce ("D.O.O. 35-2A"), amended most recently on July 24, 1987.

30. Defendant Robert Ortner is the Under Secretary for Economic Affairs of the United States Department of Commerce. Pursuant to D.O.O. 35-2A, the Under Secretary oversees the Director of the Bureau of the Census.

31. Defendant Bureau of the Census is an agency within the United States Department of Commerce.

32. Defendant John G. Keane is the Director of the Bureau of the Census. Pursuant to D.O.O. 35-2A, the Director is responsible for taking the decennial census.

33. Defendant Ronald W. Reagan is the President of the United States. Pursuant to 2 U.S.C. § 2a, the President calculates the number of representatives in Congress to which each state is entitled, based on the decennial census.

34. Defendant Donnald K. Anderson is the Clerk of the United States House of Representatives. Pursuant to 2 U.S.C. § 2a, the Clerk notifies each state of the number of representatives in Congress to which it is entitled.

LEGAL FRAMEWORK

35. Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, requires that representatives in Congress be apportioned according to population. For the purpose of determining population, Article I further requires that, every ten years, the United States government conduct the most accurate census practicable. These requirements are implemented by 2 U.S.C. § 2a, 13 U.S.C. § 141, and D.O.O. 35-2A.

36. Article II, Section 1 of the Constitution requires that the number of electors each state appoints to the Electoral College be equal to the number of representa-

tives and senators in Congress to which the state is entitled. This requirement is implemented by 3 U.S.C. § 3.

37. Pursuant to 13 U.S.C. § 141(b), each state is entitled to a number of representatives in Congress based on the state's population. Pursuant to 13 U.S.C. § 141(c), each state is entitled also to a report of its population broken down by municipalities and other geographical areas, for use in legislative apportionment and districting.

38. States and municipalities use the data reported to them pursuant to 13 U.S.C. § 141(c) to draw Congressional districts and to apportion state and municipal legislative districts in accordance with the "one man, one vote" requirements of the Constitution.

39. Finally, census data are used for distributing funds for housing, education, transportation, environmental protection, and other services among states and municipalities.

FACTS

The Inevitability of an Undercount in 1990

40. In every decennial census since at least 1940, there has been an undercount of the population of the United States. The national undercount has been reduced progressively over this period, but the undercount of the following groups has remained consistently and substantially higher than the national undercount: Blacks, Hispanics, other racial and ethnic minorities, documented and undocumented aliens, homeless persons, persons who do not read and speak English well, and persons living in poverty or in high-crime areas. These groups are referred to collectively as the "chronically undercounted."

41. The best-documented of the chronically undercounted are Blacks. In 1987, the Director of the Census Bureau stated that, in the last four censuses, there has been a "persistent difference" of five to six percent between the undercount of Blacks and the undercount of all others. The Director also said that the undercount of

Hispanics has been comparable to the undercount of Blacks.

42. The chronically undercounted constitute a substantially higher percentage of the population of urban areas, including the plaintiff municipalities, than they do of the population of the respective states in which the municipalities are located. The chronically undercounted also constitute a substantially higher percentage of the population of those states than they do of the population of the nation as a whole. As a result, the undercount of the urban areas has been substantially higher than the undercount of the states in which the areas are located, and the undercount of those states has been substantially higher than the undercount of the nation as a whole.

43. The chronically undercounted constitute a substantially higher percentage of the population of the Congressional and state legislative districts in which the individual plaintiffs reside than they do of the population of the respective states in which the districts are located. The chronically undercounted also constitute a substantially higher percentage of the population of those states than they do of the population of the nation as a whole. As a result, the undercount of the individual plaintiffs' districts has been substantially higher than the undercount of the states in which the districts are located, and the undercount of those states has been substantially higher than the undercount of the nation as a whole.

44. Unless the relief requested below is granted, the undercount of the urban areas and districts described in paragraphs 42 and 43 will, in the 1990 decennial census, be substantially higher than the undercount of the states in which they are located, and the undercount of those states will be substantially higher than the undercount of the nation as a whole.

The Use of Statistical Correction

45. Over the last two decades, statisticians have developed and refined certain techniques to correct the census for undercount. The principal technique is "dual-system estimation." This technique involves the taking of an independent second count of a sample of geographic areas. The persons identified in the second count are matched with the persons identified in the first—the census—to produce a third and better estimate of the population of those areas. Then, extrapolating from the sample, the Bureau estimates the population of the nation as a whole, as well as of other geographic areas and racial and ethnic groups. The independent second count is conducted shortly after the census enumeration and is referred to as a "post-enumeration survey."

46. After the 1980 census, the Census Bureau formed an Undercount Research Staff to conduct research on dual-system estimation. In the years that followed, the Staff conducted important work in this area, eliminating or substantially reducing each of the problems that had previously been associated with correction. The work was reviewed and praised by a number of distinguished groups, including a panel of the National Academy of Sciences. The work was also tested in a number of rehearsals of the 1990 census conducted by the Census Bureau.

47. On July 24, 1986, with the prior authorization of the Commerce Department, the Census Bureau announced publicly that it would follow a specific procedure in deciding whether to correct the 1990 census: In early 1987, it would determine whether correction was feasible. If it determined that it was, it would then prepare to correct in 1990. Central to its preparations would be the implementation of a post-enumeration survey of 300,000 households. Using the survey results, the Bureau would produce corrected census figures and, if those figures met certain pre-established standards of reliability, they would become the official decennial census data. The determina-

tion whether the figures met the standards of reliability would be made by the Bureau, after the survey was taken in 1990.

48. In the spring of 1987, the Director of the Bureau determined that correction was feasible and that the Bureau should prepare to correct the 1990 census. On July 14, 1987, he announced publicly that his agency was committing itself to taking the 300,000-household post-enumeration survey.

49. On or before August 7, 1987, however, the Commerce Department secretly reversed the Director's decision. Without conducting any research of its own, the Department prohibited the Director from correcting the 1990 decennial census and conducting the planned 300,000-household survey. The Department directed him instead to conduct a smaller survey, to be used only for the purpose of evaluating the census, not for correcting it.

50. The Department's directives were made with the knowledge that they would result in a disproportionate undercount of Blacks, Hispanics, and other chronically undercounted groups, and of the states and localities in which a disproportionate number of these groups reside.

51. The Department's directives were not based on legitimate technical or operational considerations.

52. The Department's directives were inconsistent with its delegation of authority to the Director with respect to the decennial census, and constituted an unwarranted intrusion upon the Director's traditional authority.

53. On October 30, 1987, at least three months after the Commerce Department had made its decision not to correct in 1990, it announced that decision to the public.

54. It is feasible to correct the 1990 census, and correction will substantially improve the accuracy of the census.

55. Unless the Bureau's discontinued correction program is restored immediately, it may well be impossible to correct the 1990 census.

The Injury to the Plaintiffs

56. Unless the relief requested below is granted, the plaintiff states and municipalities and the individual plaintiffs will suffer loss of political representation.

57. Unless the relief requested below is granted, the plaintiff states and municipalities and the individual plaintiffs will be deprived of funds distributed under federal programs on the basis of census population figures.

58. Unless the relief requested below is granted, the plaintiff states and municipalities will be deprived of the use of accurate population figures in planning their governmental operations.

59. Unless the relief requested below is granted, the members of the plaintiff organizations will suffer loss of political representation and federal funds. Among the purposes of each of the organizations is the prevention of such losses.

60. The plaintiffs have no adequate remedy at law.

FIRST CLAIM FOR RELIEF

61. Unless the relief requested below is granted, the defendants will not take the most accurate census practicable, in violation of Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment.

SECOND CLAIM FOR RELIEF

62. Unless the relief requested below is granted, the defendants will take a census that discriminates with respect to fundamental rights against individuals residing in legislative districts that are disproportionately undercounted, in violation of the equal protection guarantee of the Fifth Amendment to the Constitution.

THIRD CLAIM FOR RELIEF

63. Unless the relief requested below is granted, the defendants will not take the most accurate census practicable, in violation of 2 U.S.C. § 2a and 13 U.S.C. § 141.

FOURTH CLAIM FOR RELIEF

64. The action of the defendants is arbitrary and capricious, contrary to law, and an abuse of discretion, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs seek judgment:

(1) Requiring the defendants to conduct a full-scale post-enumeration survey in connection with the 1990 decennial census, and to take any other steps necessary to correct that census for undercounts or overcounts in population, using the most accurate correction methods available;

(2) Requiring the defendants to correct the 1990 decennial census for undercounts or overcounts in population, using the most accurate correction methods available;

(3) Requiring the defendants to use the corrected population figures for all purposes for which the defendants use decennial census data; and

(4) Granting such other relief as the Court deems just and proper.

Dated: New York, New York
December 14, 1988

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[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

ANSWER

Defendants,[1] through their undersigned counsel, hereby answer plaintiffs' amended complaint as follows:

FIRST AFFIRMATIVE DEFENSE

Plaintiffs lack standing to maintain this action.

SECOND AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD AFFIRMATIVE DEFENSE

The amended complaint fails to state a claim upon which relief may be granted.

FOURTH AFFIRMATIVE DEFENSE

The matters alleged in the amended complaint have been committed by law to agency discretion and are not reviewable by the Court.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to state any basis for preliminary injunctive relief.

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[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Robert A. Mosbacher is substituted for defendant C. William Verity, and George W. Bush is substituted for defendant Ronald W. Reagan.

SIXTH AFFIRMATIVE DEFENSE

In response to the numbered paragraphs of the amended complaint, defendants admit, deny, or otherwise aver as follows:

1. This paragraph consists of plaintiffs' characterization of the action, which does not require an answer, but insofar as an answer may be required, deny.

2. Deny, except to admit that the results of the decennial census are used to determine the apportionment of representatives in Congress and state legislatures, the allocation of Electoral College votes in presidential elections, and the distribution of some federal funds.

3. Deny, except to admit that defendants will conduct the 21st decennial census in 1990.

4. Deny, except to admit that the Census Bureau undertook research and planning on statistical techniques to determine whether adjustment of the 1990 census for population undercounts was technically and operationally feasible.

5. Deny, except to admit that the Commerce Department oversees the Census Bureau and determined that a statistical adjustment of the 1990 census was neither technically nor operationally feasible.

6. This paragraph consists of plaintiffs' characterization of the action and not averments of fact to which an answer is required, but insofar as an answer may be required, deny.

7. This paragraph contains no averments of fact but conclusions of law to which no answer is required, but insofar as an answer is required, deny.

8. Admit.

9. Admit.

10. Admit.

11. Admit.

12. Admit.

13. Admit.

14. Defendants are without knowledge or information sufficient to form a belief as to the specific averments of this paragraph, except to admit that the plaintiff named, the U.S. Conference of Mayors, is an organization of mayors.

15. Defendants are without knowledge or information sufficient to form a belief as to the specific averments of this paragraph, except to admit that the plaintiff named, the National League of Cities, is an organization representing cities and state municipal leagues.

16. Defendants are without knowledge or information sufficient to form a belief as to the specific averments of this paragraph, except to admit that the plaintiff named, the League of United Latin American Citizens, is a Hispanic membership organization.

17. Defendants are without knowledge or information sufficeint to form a belief as to the specific averments of this paragraph except to admit that the plaintiff named, the National Association for the Advancement of Colored People, is a national civil rights organization.

18. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

19. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

20. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

21. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

22. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

23. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

24. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

25. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

26. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

27. Defendants are without knowledge or information sufficient to form a belief as to the averments of this paragraph.

28. Admit.

29. Deny the first sentence. Admit the rest of the paragraph. The Court is referred to 13 U.S.C. §§ 1, *et seq.* and Department Organization Order 35-2A for a full and complete statement of their contents. The Bureau of the Census is subject to the policy direction and general supervision of the Under Secretary for Economic Affairs of the Department of Commerce. D.O.O. 10-9, Section 4.03. The Court is referred to D.O.O. 10-9 for a full and complete statement of its contents.

30. Deny the first sentence. Admit the second sentence. The Court is referred to D.O.O. 35-2A for a full and complete statement of its contents. The Bureau of the Census is subject to the policy direction and general supervision of the Under Secretary for Economic Affairs of the Department of Commerce. D.O.O. 10-9, Section 4.03. The Court is referred to D.O.O. 10-9 for a full and complete statement of its contents.

31. Admit.

32. Deny the first sentence. Admit the second sentence, except to further answer that his actions in planning for and taking the census are subject to the policy direction and general supervision of the Under Secretary for Economic Affairs. D.O.O. 10-9, Section 4.03. The Court is referred to D.O.O. 35-2A and D.O.O. 10-9 for a full and complete statement of their contents.

33. Deny the first sentence. Admit the second sentence. The Court is referred to 2 U.S.C. § 2a for a full and complete statement of its contents.

34. Admit.

35. Admit the first sentence. Deny the second sentence, except to admit that Article I, Section 2 of the Constitution requires the United States government to conduct a census every ten years. Admit the third sentence, except to deny that the requirements of the Constitution are implemented by D.O.O. 35-2A. The Court is referred to D.O.O. 35-2A for a full and complete statement of its contents.

36. Admit.

37. Admit the first sentence. Admit the second sentence, except to deny that each state is "entitled" to a report of its population broken down by municipalities and other geographical areas for use in legislative apportionment and districting. The Court is referred to 13 U.S.C. § 141 (b) and (c) for a full and complete statement of their contents.

38. Admit.

39. Admit.

40. Admit the first sentence. Admit that the national undercount has been reduced progressively over the past 40 years, but deny the rest of the second sentence except as it pertains to blacks at the national level.

41. Deny the first sentence, except to admit that data exists to support the contention that at the national level blacks have been undercounted in previous censuses. Admit the rest of the paragraph.

42. Deny.

43. Deny.

44. Deny.

45. Deny, except to admit that statisticians have developed the "dual-system estimation" technique, which involves the taking of an independent second survey of the population in geographic areas, which is referred to as a "post-enumeration survey."

46. Admit the first sentence. Deny the second sentence, except to admit that the Undercount Research Staff (URS) conducted important research on dual-system estimation (DSE). Admit the third sentence. Deny the fourth sentence, except to admit that elements of the URS research on DSE have been tested in census tests and in the one census dress rehearsal which tested the use of DSE to evaluate census results.

47. Admit.

48. Deny the first sentence. Admit the second sentence.

49. Deny.

50. Deny.

51. Deny.

52. Deny.

53. Deny, except to admit that on October 30, 1987, the Commerce Department announced a decision which Secretary C. William Verity had reached on October 26, 1987 that the 1990 census would not be statistically adjusted.

54. Deny.

55. Deny.

56. Deny.

57. Deny.

58. Deny.

59. Deny.

60. This paragraph states a legal conclusion which does not require an answer, but insofar as an answer may be required, deny.

61. Deny.

62. Deny.

63. Deny.

64. Deny.

Each and every allegation of the amended complaint not heretofore expressly admitted or denied is hereby denied.

Defendants deny that plaintiffs are entitled to the relief for which they pray or to any relief whatsoever.

WHEREFORE, defendants, having fully answered, respectfully request that this action be dismissed with prejudice and that this Court award the defendants costs against plaintiffs and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

STIPULATION AND ORDER

WHEREAS the Secretary of Commerce is vested by law with supervisory authority over the Bureau of the Census and the conduct of the Decennial Census and does not by anything said herein intend to relinquish any authority or decisionmaking power thereby duly vested in him, including without limitation the decision whether or not to adjust the 1990 Decennial Census; and

WHEREAS the Secretary of Commerce intends that the 1990 Decennial Census shall be conducted in conformity with all applicable statutory and constitutional requirements including without limitation 13 U.S.C. § 141(b), (c) and in a manner designed to achieve the most accurate population counts practicable; and

WHEREAS the parties hereto at this time believe that the Census, including a post-enumeration survey and other adjustment-related operations, can and will be conducted in a manner that will result in the most accurate counts practicable, and no party has any basis at this time to believe that the Census, including the PES and adjustment-related operations, cannot and will not be conducted in such a manner; and

WHEREAS the parties wish to avoid the burdens, costs and delays of unnecessary litigation.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, that:

1. All pending motions, including plaintiffs' pending Motion for a Preliminary Injunction, are withdrawn.

2. Defendants agree and represent that, notwithstanding the decision by the Department of Commerce (the "Department") announced on October 30, 1987, that there would be no statistical adjustment or correction for undercount or overcount in the 1990 Decennial Census, and without conceding that that decision was incorrect, the decision is vacated, and the question of whether or not to carry out a statistical adjustment of the 1990 Decennial Census ("adjustment") shall be made by a thorough *de novo* reconsideration undertaken with an open mind, without any prejudgment, and consistent with the procedures set forth herein.

3. Defendants agree and undertake to conduct a post-enumeration survey ("PES") of not fewer than 150,000 households, a number defendants believe is sufficient for the purpose, and such other procedures or tests as they deem appropriate, as part of the 1990 Decennial Census in a manner calculated to ensure the possibility of using the PES, not solely for evaluation purposes, but to produce corrected counts usable for congressional and legislative reapportionment, redistricting and all other purposes for which the Bureau of the Census (the "Bureau") publishes data.

4. Defendants agree that the Department will promptly develop and adopt guidelines articulating what defendants believe are the relevant technical and non-technical statistical and policy grounds for decision on whether to adjust the 1990 Decennial Census population counts. The Department's proposed guidelines shall be published in the Federal Register by December 10, 1989, with a request for comments. The guidelines shall be published in final form in the Federal Register by March 10, 1990.

5. Defendants shall determine whether an adjustment satisfies the guidelines specified in para. 4 hereof. If the

Secretary determines to make an adjustment, defendants shall publish corrected 1990 Decennial Census population data at the earliest practicable date and, in all events, not later than July 15, 1991. If the Secretary determines not to make an adjustment, defendants shall publish at the earliest practicable date and, in all events, not later than July 15, 1991, a detailed statement of its grounds, including a detailed statement of which guidelines identified in para. 4 above were not met and in what respects such guidelines were not met.

6. Defendants intend to report census counts in accordance with the dates set forth in 13 U.S.C. §§ 141(b), (c). In the event that the Department releases or publishes any population counts from the 1990 Decennial Census prior to its determination with respect to adjustment in accordance with para. 5 hereof, defendants agree that each such release or publication shall bear the following legend conspicuously on the first page:

> "The population counts set forth herein are subject to possible correction for undercount or overcount. The United States Department of Commerce is considering whether to correct these counts and will publish corrected counts, if any, not later than July 15, 1991."

7. Defendants shall establish as soon as practicable and, in all events, not later than September 30, 1989, an independent Special Advisory Panel (the "Panel") to advise the defendants on all matters relevant to the implementation of this Stipulation and, in particular, and without limitation, the guidelines identified in para. 4 above, the application and achievement of the guidelines, the expedition with which defendants are proceeding toward decision on adjustment, and plans and schedules for the implementation of the Census and the PES in a manner that will result in the most accurate final census data at the earliest practicable time. The Panel shall be comprised of eight persons, none of whom shall be em-

ployed by any of the parties hereto, of such knowledge, judgment, and probity that their judgment and advice shall be entitled to the utmost respect by defendants. All eight persons shall be appointed by the Secretary of Commerce. The Panel shall have two co-chairs from among their number appointed by the Secretary. Each member of the Panel shall submit his or her recommendations to the Secretary.

8. The members of the Panel shall be entitled to call for and shall receive the fullest cooperation from defendants, including access to all necessary or appropriate information and the opportunity to consult with any employee of the Bureau. Defendants shall take all steps necessary to give each member of the Panel reasonable access to all relevant records and information, including administering appropriate oaths of secrecy pursuant to 13 U.S.C. § 9. The Panel or any member thereof may make such disclosures, consistent with all applicable statutory requirements, as it or he deems appropriate. The Panel may adopt such rules for its governance as it deems appropriate.

9. The Department shall pay the members of the Panel a stipend of $284.80 per day for each day on which the Panel meets and such member is present and shall reimburse the members of the Panel for their reasonable and necessary expenses of travel and lodging in connection with the work of the Panel. The Department shall furnish the Panel with appropriate meeting and office facilities and clerical assistance. The Panel is entitled to retain appropriate assistants who shall be entitled to access to all materials made available to the Panel. Defendants shall make available to the Panel a fund of $500,000 against which each co-chair may draw, consistent with existing laws, rules, and regulations governing the expenditure of appropriated funds, for appropriate resources to ensure that Panel members can perform their mission.

10. The Panel shall dissolve on agreement of the parties that all of its functions pursuant to this Stipulation have been satisfied.

11. Except as expressly set forth herein, the parties reserve all their respective rights, claims, and defenses. Specifically, and not by way of limitation, plaintiffs reserve the right to challenge any of the guidelines, decisions, or procedures adopted, omitted, implemented, or announced in connection with or arising out of this Stipulation.

Dated: July 17, 1989

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SO ORDERED:

/s/ Joseph M. McLaughlin
U.S.D.J.

APPENDIX SEVEN

CENSUS BUREAU DIRECTOR RECOMMENDATION

RECOMMENDATION TO SECRETARY OF COMMERCE ROBERT A. MOSBACHER ON WHETHER OR NOT TO ADJUST THE 1990 CENSUS

Barbara Everitt Bryant

Director, Bureau of the Census
Department of Commerce

June 28, 1991

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RECOMMENDATION TO SECRETARY OF COMMERCE ROBERT A. MOSBACHER ON WHETHER OR NOT TO ADJUST THE 1990 CENSUS

Barbara Everitt Bryant
Director, Bureau of the Census
Department of Commerce

June 28, 1991

This section of the report is organized in three sections:

Recommendation
Background
Discussion of Guidelines

RECOMMENDATION

There now exist one enumeration and two estimates of the *resident* population of the United States on April 1, 1990.

248,709,873	Resident population as enumerated in the 1990 census (an additional 922,000 overseas military, Federal employees and their dependents were added to the resident population to make up the apportionment population of 249,632,692 delivered to President George Bush December 26, 1990).
253,393,786	Estimate of resident population from Demographic Analysis (DA)
253,979,141	Estimate of resident population from Post-Enumeration Survey (PES) using Selected PES Model. This is the "adjusted" resident count.

The latter two estimates were made using the most extensive post-census research ever conducted by the Bureau of the Census.

Recommendation: As Director of the Bureau of the Census, I, Barbara Everitt Bryant, recommend to Secretary of Commerce, Robert A. Mosbacher, that results of the 1990 Post-Enumeration Survey be used to statistically adjust the 1990 census.

I make this recommendation for these reasons:

1. I believe that statistical adjustment, while far from a perfect procedure, will on average increase the accuracy of the 1990 census.

2. A majority of the Undercount Steering Committee, comprised of nine senior, career, statistical and demographic experts in the Bureau of the Census, believe statistical adjustment leads to an improvement in the counts as enumerated. I have sat through the months of deliberations of this Committee as an *ex-officio* member. Most particularly, I sat in on extensive deliberations from mid-April to mid-June 1991. The Committee evaluated the Post-Enumeration Survey and use of the model for adjustment that was pre-specified in April 1990. I have listened to research teams and consultants supervised by members of this Committee present results of 19 studies to evaluate the quality of the Post-Enumeration Survey and 11 studies of Demographic Analysis, the alternative method used to estimate the population.

3. The 1990 census counted approximately 98 percent of the population of the United States. Compared to all other survey-type efforts, whether done by government agencies, academic survey research centers, or private sector survey

organizations, counting 98 percent of a diversified population in a democratic country with no mandatory individual or household registration is an extraordinary feat. However, there remains about 2 percent of the population *who cannot be reached by enumeration efforts*, for reasons of being disconnected from the society, not understanding the census, apathy, or purposefully avoiding being counted. According to the Post-Enumeration Survey, approximately 5.3 million persons were uncounted in the 1990 census of whom 1.5 million were Blacks and 3.8 million Non-Blacks (a substantial number of the Non-Blacks were Hispanics). The size of the population that cannot be enumerated has grown over the past decade.

4. The Bureau of the Census has measured census undercount since 1940. This undercount is differentially higher for Blacks than Non-Blacks, for males than females. It is time to correct this historical problem. Extra ordinary efforts were made in 1990 to reduce the differential undercount. The differential was not reduced. There is no currently identifiable methodology to attain 100 percent population coverage via enumeration in 2000. With the increasing diversity of the country, a growing diversity documented by the 1990 census, the problem could be larger in 2000. Thus correcting for the small percent who cannot be reached should be addresed now.

5. The decennial census is the benchmark. It is the basis for drawing samples for all other household surveys during the decade, surveys that provide the Federal Government with many of the economic and social indicators used for program

planning and evaluation. It is the base from which estimates of the population are made between censuses. It is important for national social and economic statistics that this benchmark count be made as accurate as possible.

6. The quality of the 1990 Post-Enumeration Survey is excellent. Thus—for the first time in history—a tool exists with which to correct the census enumeration to make it more accurate. Two independent types of research provide estimates that the resident population of the United States is 253-254 million, not 248.7 million, as enumerated.

There is no perfect truth as to the size and distribution of the population. Adjusting may bring the numbers closer to the truth, but precise truth cannot be measured. Adjustment, while improving counts for a majority of states and communities, may not improve the count for every community; it may even reduce accuracy for some. There are places where the count, as enumerated, is closer to the truth.

Adjustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree. The minority viewpoint expresed in the Census Bureau's report, which follows my report, illustrates this.

I stand, however, with the majority of the Census Bureau's Undercount Steering Committee in judging that adjustment would improve the 1990 census.

BACKGROUND

The Bureau of the Census used two types of research to evaluate the completeness of the 1990 census. These are described more fully in Appendices 3-5, but are summarized here.

Demographic Analysis:

Postcensus research to estimate the adequacy of census enumeration (coverage) of the population is not new. Demographic Analysis—using birth, death, immigration and other noncensus administrative records goes back to 1940. Historically, post-census research has been conducted for evaluation purposes to assist in planning the next census rather than for adjusting the most recent one.

Census Bureau demographers have improved and refined Demograpsic Analysis through the years, using new analyses of historical data and findings from each census to improve estimates. Thus, it has been possible to make retrospective corrections to Demographic Analysis estimates that were published after each census. According to Demographic Analysis, the census counted 98.2 percent of U.S. residents in 1990, while 1.8 percent were not counted. Based on the most current research, undercounts for the past six censuses are as shown in Table A.

Table A

Historical Estimates of the Amount and Percent of Net Undercount as Measured by Demographic Analysis, by Race: 1940 to 1990

	Demographic Analysis Estimates of Net Undercount [1] (Amount in thousands)											
	1990		1980		1970		1960		1950		1940	
	Amount	%	Amount	%	Amount	%	Amount	%	Amount	%	Amount	%
Total Population	4,684	1.8	2,802	1.2	5,653	2.7	5,700	3.1	6,537	4.1	7,513	5.4
Black	1,836	5.7	1,257	4.5	1,566	6.5	1,327	6.6	1,225	7.5	1,187	8.4
Non-Black	2,848	1.3	1,545	0.8	4,087	2.2	4,374	2.7	5,312	3.8	6,326	5.0
Difference	NA	4.4	NA	3.7	NA	4.3	NA	3.9	NA	3.8	NA	3.4

[1] Estimates represent "point" estimates of net undercount for each census and are subject to uncertainty regarding the accuracy of the estimates. The estimates for 1940-1980 are based in part on the "reverse projection" of the population aged 65 and over in 1990 using estimates of population change, which adds another component of error in those coverage estimates. The estimates represent revisions of previously published coverage estimates for 1940-1980.

As you can see, the estimated undercount in the census dropped over successive censuses from 5.4 percent in 1940 to 1.2 percent in 1980[1]. In 1990, undercount rose slightly to 1.8 percent. Throughout the period of the six censuses, however, the undercount differential between the Black and Non-Black population has remained in the 3.4-4.4 percent range. For 1990, Demographic Analysis shows a differential of 4.4 percent.

For the 1990 census, the Census Bureau mounted the most extensive effort ever to enumerate Blacks and other minorities. This included the hiring of 280 community outreach workers who worked in communities two years before census taking; involvement of 56,000 community organizations—mostly minority but also city and state Complete Count Committees; outstanding cooperation from Black and Spanish language media in running public service announcements and programs about the importance of the census; and the hiring of follow-up enumerators from minority populations, bilingual and multilanguage enumerators, and residents of public housing projects and American Indian reservations to enumerate persons in their neighborhoods. Despite this effort, the undercount differential was not reduced below its historical level.

Post-Enumeration Survey:

Demographic Analysis can provide estimates only at the national level and only for males and females, Blacks and Non-Blacks by age groups. A second type of research, a Post-Enumeration Survey, can provide detail

---

[1] The undercount estimate according to Demographic Analysis published after the 1980 census in *The Coverage of Population in the 1980 Census* by Robert E. Fay, Jeffrey S. Passel, and J. Gregory Robinson (U.S. Department of Commerce, Bureau of the Census, February 1988, Table 3.2) showed 1.4 percent undercount. 1.2 percent is the revision made as part of the improvements in Demographic Analysis developed for evaluation of the 1990 census.

by demographic groups and for areas below the national level. A Post-Enumeration Survey, not Demographic Analysis, can be used as the basis for adjustment. After the 1980 census, the Bureau of the Census conducted a post-census survey for the first time. The quality of this survey was not adequate for use for adjustment purposes, and the analyses of it occurred long after the census. In the decade since, the Census Bureau has researched improvements in the methodology of post-enumeration surveys. The 1990 Post-Enumeration Survey proves to be a high quality survey of 167,000 households with matching of the individuals in these households to the 1990 census to identify those who were counted or missed.

According to the 1990 Post-Enumeration Survey, the census counted 97.9 percent of U.S. residents, but did not count 2.1 percent. As Table B shows, the 1990 undercount for Blacks is 4.8 percent; 5.2 percent for Hispanics; 5.0 percent for American Indians; 3.1 percent for Asian and Pacific Islanders, and 1.7 percent for Non-Blacks. Differences in the Black and Non-Black count between the Demographic Analysis and the Post-Enumeration Survey are not statistically significant.

Table B.

Selected Post-Enumeration Survey (PES) Estimates of Total Resident Population: United States Total

Race/ Hispanic/ Sex Group	Resident Census Enumeration	Selected PES Estimate of Population	Estimated Under/ Over-count Rate	Margin of Error due to Sampling
Total	248,709,873	253,979,141	2.1	0.4
Male	121,239,418	124,249,093	2.4	0.4
Female	127,470,455	129,730,048	1.7	0.4
Black	29,986,060	31,505,838	4.8	0.6
Male	14,170,151	14,974,382	5.4	0.6
Female	15,815,909	16,531,456	4.3	0.6
Non-Black	218,723,813	222,473,303	1.7	0.4
Male	107,069,267	109,274,711	2.0	0.4
Female	111,654,546	113,198,592	1.4	0.4
Other Populations of Interest				
Asian or Pacific Islanders	7,273,662	7,504,906	3.1	0.9
Male	3,558,038	3,688,436	3.5	1.0
Female	3,715,624	3,816,470	2.6	0.9
American Indian	1,878,285	1,976,890	5.0	2.1
Male	926,056	980,874	5.6	2.2
Female	952,229	996,016	4.4	2.0
Hispanic [2]	22,354,059	23,590,274	5.2	0.8
Male	11,388,059	12,086,513	5.8	0.9
Female	10,966,000	11,503,761	4.7	0.9

[2] Persons of Hispanic Origin may be any race.

Demographic Analysis and Post-Enumeration Survey results are similar, but not identical. The Demographic Analysis, although not usable for adjustment, does serve to confirm the results of the Post-Enumeration Survey with some exceptions. Exceptions are that Demographic Analysis shows less undercount among females and more undercount among Black males than does Demographic Analysis. Demographic Analysis and the Post-Enumeration surveys differ on the undercount within several age groups. Overall, however, both Demographic Analysis and the Post-Enumeration Survey, show a total population undercount of approximately 2 percent. Both show differentials between the counts of Blacks and Non-Blacks, males and females, with Blacks (Black children age 0-9 and Black males age 20-64) and males in total having the higher undercounts. Additionally, the Post-Enumeration Survey shows an undercount differential for Hispanics and American Indians comparable to that for Blacks. It shows a somewhat smaller undercount for Asians and Pacific Islanders, though still larger than that for Non-Blacks.

Because political representation and many Federal, State, and local funds are apportioned on the basis of census counts, the missing 2 percent are important to the communities and states in which those who do not cooperate or those who actively avoid the census live. You have heard from many mayors, governors, and legislators who stress how vital a full count is to them, and we at the Census Bureau have heard from them as well.

We have also heard the views of elected officials from states and communities where there was a full count. They say their residents cooperated; their states and communities provided human and monetary resources to get their residents counted accurately. They feel that places with undercounts had the opportunity to do the same and should not benefit from an adjustment at the expense of places where residents were cooperative.

While listening to both points of view, I base my recommendation to adjust the 1990 census on concern for accuracy of the count—both numerically and proportionally.

DISCUSSION OF GUIDELINES

Guideline 1: The Census shall be considered the most accurate count of the population of the United States, at the national, state, and local level, unless an adjusted count is shown to be more accurate. The criteria for accuracy shall follow accepted statistical practice and shall require the highest level of professional judgment from the Bureau of the Census. No statistical or inferential procedure may be used as a substitute for the Census. Such procedures may only be used as supplements to the Census.

To determine whether the census count or the adjusted count is the most accurate, the Census Bureau made its best estimate of the "true" resident population of the United States and compared the census and adjusted counts to that.

The procedure used to produce the adjusted counts was to classify individuals into one of 1,392 classifications, called post-strata. Every individual in the United States fits into one, and only one, of these post-strata. These post-strata are based on census division (such as New England or Pacific), type of place of residence (such as large or small city, suburban, nonmetro), tenure (owner or renter housing), race, Hispanic ethnicity, sex, and age. The Post-Enumeration Survey (PES), plus matching of PES households to census questionnaires, measured the proportion of each post-strata classification who were counted in the census, in the PES, counted in both, or in one but not the other. The Census Bureau used an estimating method called the Dual System Estimate (DSE) and a "smoothing method" (discussed later in this report) to estimate the population. The estimate included an

estimate for those who were missed by both the census and the PES. The DSE made this estimate nationally and for each of the 1,392 post-strata of persons. This gave the adjusted counts.

To estimate the "true" population required making many evaluations to identify bias, sampling error and other errors introduced in the survey process in the PES and the resultant DSE. These errors and biases were combined in a Total Error Model that was used to correct the Dual System Estimates for post-strata aggregated into 13 larger strata, each with similarities in characteristics. This modified population estimate was then used as the best approximation of the "true population" against which to compare both the adjusted counts and the census. This process just described is a statistical procedure called Loss Function Analysis.

Loss Function Analysis statistically describes the consequences of using a particular set of data with its aggregate loss due to error in the distribution of the population. The focus of the analysis is on *distribution* rather than magnitude of the estimates of the population. It is an appropriate tool to use to evaluate the census because most Federal uses of census data are for porportional distributions.

Loss Function Analysis shows that there would be an accuracy gain in proportion of population for 29 states offset by possible inaccuracy in 21. Inaccuracy can be in the direction of moving an area to a proportional overcount, as well as undercount, so inaccuracy is not necessarily harmful to the area. The states where accuracy would be improved contain two-thirds (67 percent) of the nation's population enumerated in the census.

Adjustment would improve the proportional accuracy of the counts for approximately 54 percent of cities and places with populations of 100,000 or more and 72 percent of counties with 100,000 or more. Demographers

reviewed adjusted counts for these places and compared them to other data—1980 counts, intercensal estimates and demographic characteristics—to see whether these adjusted counts have "face validity," that is, do they make sense? The vast majority do, but there are some exceptions. Adjustment will improve the accuracy of the 1990 population for the majority, but not for all places.

In addition to Loss Function Analysis computed by statisticians, demographers made an independent evaluation of the adjusted population counts for states. To do this they compared the adjusted state counts with counts simulated by Demographic Analysis. To make the simulations (because Demographic Analysis is only at the national level), they disaggregated census counts for each state by race and Hispanic ethnicity. They then applied DA national undercount rates to Black and Non-Black subpopulations and PES rates to Hispanic and Asian and Pacific Islanders. Then they built up new state estimates by recombining the racial and ethnic groups. These simulated state estimates further confirmed the "face validity," or reasonableness, of the adjusted state counts.

The Census Bureau examined proportional distribution for places of under 100,000. There is little direct evidence to judge whether adjusted counts are more accurate for places under 100,000. However, Loss Function Analysis shows that for metropolitan places of less than 25,000, 25,000-49,999 and 50,000 or more, and for non-metropolitan plans less than 25,000, and 25,000-49,999 in total, by these size categories, adjusted counts are more accurate than the census. However, there are concerns about the accuracy of the loss function assumptions for small areas.

The Census Bureau's nine member Undercount Steering Committee majority judges that the improvement in counts on the average for the Nation, States, and places over 100,000 population outweighs the risk that the ac-

curacy of adjusted counts might be less for smaller areas. The minority on that Committee have concerns about whether the Total Error Model is accurately measuring all sources of error.

Loss Function Analysis, based on the method of estimating the "true" population used, shows that adjustment is better than the census for apportionment. It is more likely that the corrected apportionment based on an adjusted count would be closer to the truth than further from the truth.

The Census Bureau subjected the PES and resultant DSEs to test after test to find fatal flaws in procedures. The Census Bureau did not find fatal flaws.

Evaluations show that the PES is of sufficiently high quality to use as an adjustment tool. In the professional judgment of the Census Bureau's Undercount Research Committee, this survey and the Selected PES model for adjustment improve the count over the census.

The adjusted count would improve accuracy by correcting major differentials in coverage by race and ethnicity compared to the census. Existence of these differentials is supported by Demographic Analysis and historical data. Using the adjusted numbers would not totally close the gap in the undercount of Black children aged 0-9 and Black men aged 20-64, but it would be an improvement over the census. Since minority undercounts impact on many local areas, adjusted counts would clearly improve the count for places with major minority populations. Offsetting these gains, Demographic Analysis suggests that adjustment may over correct for females. Taking into account 24 age-sex-groups, the similarity between the Post-Enumeration Survey and Demographic Analysis (though there are some differences) suggests that the PES is reflecting real undercounts in the census that adjustment would substantially, though not completely, correct.

The PES, supported by Demographic Analysis, estimates that the resident population of the United States on April 1, 1990 was approximately 5.3 million greater than was counted in the census. The fact that both these Census Bureau research projects, including the one based on administrative records rather than census data, produce nearly the same 5 million number is strong evidence that these residents of the United States exist. Logic also supports the existence of people who cannot or will not be counted, although logic cannot confirm their numbers. In my opinion, not adjusting would be denying that these 5 million persons exist. That denial would be a greater inaccuracy than any inaccuracies that adjustment may introduce.

Guideline 2. The 1990 Census may be adjusted if the adjusted counts are consistent and complete across all jurisdictional levels: national, state, local and census block. The resulting counts must be of sufficient quality and level of detail to be *usable* for Congressional reapportionment and legislative redistricting, and for all other purposes and at all levels for which census counts are published.

The adjustment model as designed allows adjustment to be carried out across all jurisdictional levels. As described earlier, each individual is classified into one of 1,392 post-strata. The PES and matching to census questionnaires plus use of the DSE measure the under/overcount of each post-stratum so that an adjustment factor can be calculated for each. Each individual is then weighted by the adjustment factor for his or her post-stratum to create the adjusted populations at all levels. This is called synthetic adjustment. The model carries out adjustment consistently and completely across all jurisdictional levels.

Because of the problems of correcting a census with a survey, an adjusted count cannot be accurate in each

of the 4 million occupied blocks, or at all larger aggregations of them. There is no PES system—short of one which took a second perfect census—that could say adjusted counts are more accurate for all blocks.

Relevant to whether counts can be carried to all levels is the question of whether the assumption approximately holds that the probability of being counted in the census is the same for all persons in the same post-strata classification. When people are combined by age and sex, these 1,392 post-strata are subdivisions of 116 larger post-strata. To test whether the people living on blocks within these 116 larger post-strata are homogeneous, that is, alike, on factors related to being counted or not, the Census Bureau conducted an analysis of the homogeneity of 115 of the 116 larger post-strata (the 116th is persons living on Indian reservations). This was done using a regression prediction model to predict an adjustment factor for block parts, then comparing that with the factor of 1.0 (no adjustment) representing the census counts. This predicted adjustment factor was also compared with the measured factor for the post-strata to be used for adjusted counts. For 24 of the 115 post-strata the census count was superior while for 91 post-strata the adjusted count was superior. This gave support to the accuracy of the Selected PES adjustment model for carrying adjustment out at the block-level within post-strata.

Two studies examined the validity of using post-strata based on census division, rather than states, for estimation. The synthetic adjustment uses post-strata based on census divisions. The two studies gave different reults. One study showed that in 8 of the 9 regions there were no significant differences among states within post-strata. The other showed significant state effects within post-strata. The Census Bureau put more weight on the first study.

Professional judgment of the majority of the Census Bureau's Undercount Steering Committee is that the prob-

ability of having been counted or not in the census is sufficiently homogeneous among block parts within post-strata to support adjustment. The minority on the Committee are concerned about the prediction model and the difference by states. I stand with the majority in use of the Selected PES adjustment model.

Guideline 3: The 1990 census may be adjusted if the estimates generated from the pre-specified procedures that will lead to an adjustment decision are shown to be more accurate than the census enumeration. In particular, these estimates must be shown to be robust to variations in reasonable alternatives to the production figures, and to variations in the statistical models used to generate adjusted procedures.

Pre-specification: Procedures for postcensus research and the model for adjustment were pre-specified in April 1990. Census Bureau statisticians set specifications well before field work for the PES and long before there were any census data. Thus there was no possibility of the model being designed to attain a desired outcome.

The Census Bureau report, which follows this one, documents on pages 9-10 that procedures were carried out according to pre-specification with one exception. A method needed to be developed to treat some unusually large variances in the operation called "smoothing." These large variances had not been anticipated. Census Bureau statisticians discussed the method they selected to handle these with the Special Advisory Panel, who also agreed these large variances should be handled separately.

Accuracy: The section on Guideline 1 states reasons why I believe that adjusted numbers are more accurate than the census.

Robustness: "Robustness" refers to the strength of a statistical model, that is, will reasonable variations produce the same results? Census Bureau statisticians examined robustness of components of the adjustment pro-

cedures at several levels, as described on pages 10-12 of their report. They simulated alternatives to the model used for imputation of missing data from the PES. There were very little missing data in this survey. The Dual System Estimates of population showed little differences between the model used and the simulated alternative ones.

The robustness of the adjustment model to variations in post-strata by alternatives of census division or state were tested to see if either stratification treatment produced different estimates of state populations. This was done following production of preliminary PES adjustment factors, which showed states within census divisions had similar undercounts. Only 3 states showed differences in population estimates when the post-stratification was done by states rather than the pre-specified census divisions. However, this analysis was limited because the PES was not designed to support direct state estimates. Some of the work discussed for Guideline 2 indicated that, in general, the post-stratification was robust.

Comparing alternative adjustment models which did not use census divisions for stratification, the Undercount Steering Committee felt that alternative methods, though differing, were still more accurate than the census. In effect, any bias in making state estimates by division would be offset by other gains.

As I discussed earlier, the Census Bureau used a "smoothing" procedure to reduce the effect of sampling errors on the adjustment factors. The smoothing model did prove to be sensitive, that is, not robust, to variations in handling of the small number of unusually large variances. There is also concern that different sets of predictor variables could product a different set of adjustment factors. Thus, the weakness of the pre-specified PES adjustment model is in its sensitivity to changes in the smoothing procedure. (See pages 11-12 of the Census Bureau

report). In that report the Undercount Steering Committee says, "The Committee is concerned about the lack of robustness in the strictest sense and potential problems in the smoothing process. On balance, the majority finds there is no evidence to conclude that concerns about the smoothing model would affect their overall assessment about the accuracy of the adjusted numbers . . . The minority cannot conclude that lack of robustness in the smoothing model is a small enough problem not to affect the accuracy of adjusted numbers."

For a final test, statisticians compared the Selected PES adjustment model that used the smoothed variances with two other models that based post-strata on different variables (for example, owner/renter). These two models produced DSEs closer to those in the Selected PES model than to the census.

Guideline 4. The decision whether or not to adjust the 1990 Census should take into account the effects such a decision might have on future census efforts.

Accurate measurement of actions individuals might take 9 years in the future is not possible. We did try to get some "feeling" for the impact a 1991 decision to adjust or not adjust the 1990 census might have on the next census. This was done by contracting with National Opinion Research Center (NORC) for a short telephone survey to recontact persons in a representative national sample of 2,478 households interviewed last year, shortly after the census, for a study of census participation. Both NORC and I agreed that measuring a "what if" situation cannot predict participation in the year 2000 census. What can be measured is a sense of how people feel *now* about what their participation might be.

NORC was able to complete interviews with persons in 1,612 (or 65 percent) of the households between May 3 and June 3, 1991. Those dates were after release of

preliminary PES adjustment figures (on April 18) and before release of the final ones (on June 13).

What the study shows is that the controversy over whether to adjust or not erodes individual intentions to participate, but that intentions to participate would be little different whether the census were to be adjusted or not.[3]

First of all, the survey shows that the adjustment issue is not high in public consciousness or well understood. Only one-quarter (23.4 percent) of persons said they had seen or heard anything about the census in the past few months. When probed about what they had seen or heard, only 14.1 percent spontaneously mentioned anything to do with adjustment, undercount or errors in the census count. This overall 14.1 percent level ranged from 7.6 percent of those with less than a high school graduate education to 22.9 percent of those who are college graduates. When told that people are talking about whether or not to adjust the results of the census to correct for errors in counting the population, 22.3 percent then recalled they had seen or heard something about this. Probing questions showed that only 4.9 percent understand the adjustment issue.

Thus for many, the survey itself became the educational tool about the adjustment issue. Table C shows measures of likelihood of participating in the next census. The Initial Measure was the first question in the survey, before any mention of adjustment. There were two Final Measures, one asking about likelihood of participating if the 1990 census were not adjusted and one about likelihood if it were adjusted. While all measures show high intentions of participating in the next census (higher than the proportion who returned mail questionnaires in 1990), there is a drop between the Initial Measure and both Final

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[3] National Opinion Research Corporation, *The Potential Impact of Adjusting or Not Adjusting the 1990 Census*, June 19, 1991.

Measures. Between the two measures, there was explanation of the issue of adjustment, several measures of potential participation under different scenarios for census-taking, and then the Final Measure.

The big dropoff between Initial and Final Measures is among those in the top category. Approximately 40 percent of those who initially said they were "extremely likely to participate" shifted to "very" or "somewhat." About 35 percent of the "very likelys" split to shift both up to "extremely" and down to "somewhat likely to participate."

Table C.

Participation in the Next Census

INITIAL MEASURE: How likely is it that your household will participate in the next census? That is, when you receive the next census questionnaire in the mail, how likely is it that a member of your household will fill it out and mail it back?	FINAL MEASURE OF LIKELIHOOD OF PARTICIPATING IN NEXT CENSUS: What if the decision is made to NOT ADJUST/ADJUST the 1990 census figures this year? How likely would your household be to participate in the next census?	
Initial	Final/Not Adjust	Final/ Adjust
Extremely likely	48.5	31.9	33.4
Very likely	35.8	39.4	42.1
TOTAL EXTREMELY AND VERY	84.3	71.3	75.5
Somewhat likely	9.2	18.4	17.2
Not very likely	5.5	8.6	5.3
Don't know/refused	1.0	1.7	2.0
	100%	100%	100%

Source: NORC, June 10, 1991.

Based on all the data in the survey, my summary is that if the next census were being taken today, the damage to

participation comes from the controversy surrounding adjustment rather than what the decision is. Intention to participate is marginally higher if the census is adjusted than if it is not. Three-quarters (75.5 percent) are "extremely or very likely to participate" if the census is adjusted compared to 71.3 percent if it is not. This difference is greater than could be caused by sampling error.[4] However, NORC points out in its conclusions: "While large numbers remain very favorably disposed to participating in the next and future censuses, this intention is a very slippery, ephemeral and changeable one . . . subject to influence by factors like the adjustment decision or, more likely, from the controversy or fallout emanating from the events that follow that decision."

Guideline 5. Any adjustment of the 1990 census may not violate the United States Constitution or Federal statutes.

As I have no legal training, I cannot make a professional judgment on this Guideline.

Guideline 6. There will be a determination whether to adjust the 1990 Census when sufficient data are available, and when analysis of the data is complete enough to make such a determination. If sufficient data and analysis of the data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 census.

I feel sufficient data now exist to make the decision. The Census Bureau has completed all of the pre-specified evaluation studies of both Demographic Analysis and Post-Enumeration Survey results. The Census Bureau has run adjusted numbers using the PES data three ways: raw data, an initial modification, and finally choosing the Selected PES model as the best adjustment model—given

[4] 95 percent confidence level.

pre-specification in April 1990—that could be evaluated and used to produce adjusted counts by July 15, 1991.

I share with researchers at the Census Bureau the wish that there were more time to evaluate these studies and adjustment models in greater depth. However, it is always the case with research that each exploration suggests future work.

Over the coming years, perhaps even within the current year, Census Bureau statisticians are likely to develop an adjustment model, using the 1990 PES data, which improves on the Selected PES model. However, such a model is more likely to modify than to radically change the population adjustments of the Selected PES model.

New computer tapes with adjusted counts at all jurisdictional levels (PL 94-171 tapes used for redistricting) for 50 states and the District of Columbia will be available July 15.

Guideline 7. The decision whether or not to adjust the 1990 Census shall take into account the potential disruption of the process of the orderly transfer of political representation likely to be caused by either course of action.

The question of whether or not to adjust the 1990 census count has already caused some disruption. Some states have moved ahead with redistricting while others are waiting for the adjustment decision. Redistricting is always a difficult, and often controversial process. If the decision is made to adjust, clearly existing plans will require revision, most particularly in the states for which the number of seats in the House of Representatives changes.

The best case scenario is that the decision either to adjust or not adjust affects only redrawing of plans or moving ahead with redistricting. Redistricting is now a computerized process. New and alternative plans can be

produced quickly. It is the political negotiations, not the production of redistricting plans, that cause delays.

The worst case scenario would be any court or Congressional action which prevented timely reapportionment and redistricting.

There are suits in court both pro and anti-adjustment, although the suit that has precipitated the July 15, 1991 deadline for decision was brought by plaintiffs with a pro-adjustment position. There will be controversy in Congress whatever the decision. Therefore, I do not think that the decision to adjust is potentially more disruptive than the decision not to adjust.

Guideline 8. The ability to articulate clearly the basis and implications of the decision whether or not to adjust shall be a factor in the decision. The *general rationale* for the decision will be clearly stated. The technical documentation lying behind the adjustment decision shall be in keeping with professional standards of the statistical community.

The task is to articulate the use of either:

A count with a measured undercount

or

A count with a statistical adjustment to correct undercount

While explaining the first may be somewhat easier to do in layman's terms than explaining the second, either requires the Secretary of Commerce, the Department of Commerce, the Economics and Statistics Administration and the Bureau of the Census to defend the position taken.

I view articulation of the basis of the decision to adjust or the decision not to adjust as equally challenging. Therefore, this Guideline does not weigh in my recom-

mendation. There will need to be both a layman's and a statistical explanation of either choice.

The Census Bureau has maintained technical documentation of all research and procedures.

I close by repeating what I said at the beginning: I recommend statistical adjustment to improve the accuracy of the 1990 census.

APPENDIX TEN

PRESS RELEASES FROM APRIL 18, 1991 AND JUNE 13, 1991

[Materials Lodged with the Clerk of the Court]

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Case No. 88-CV-3474

THE CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT
OF COMMERCE, ET AL., DEFENDANTS

STIPULATION OF FACTS PROPOSED BY DEFENDANT-INTERVENOR STATE OF WISCONSIN

Plaintiffs, plaintiff-intervenors, defendants and defendant-intervenors, by their undersigned counsel, stipulate to the admission of the following facts proposed by defendant-intervenor State of Wisconsin in the trial of this matter:

1. During the 1990 decennial census, the State of Wisconsin undertook measures to inform Wisconsin residents of the importance of completing and returning their census forms.

2. Wisconsin's efforts included $225,000 of state funds being allocated for a statewide public awareness campaign

and a $525,000 matching grant program, also funded by the state, aimed at reaching groups traditionally undercounted in the decennial census.

3. The statewide public awareness campaign was launched with a kick-off event at which Governor Tommy G. Thompson declared March 1990 "Census Awareness Month" in Wisconsin. The campaign, coordinated through the Demographic Services Center in the Wisconsin Department of Administration (DOA), included printed pamphlets, posters, buttons, bumper stickers and stickers displaying the slogan "Wisconsin's Counting on You!" These materials, along with promotional information produced by the U.S. Bureau of the Census, were distributed through state agencies, local governments, libraries, schools, businesses, county extension offices, and other statewide networks.

4. State staff also produced a public service announcement for radio and television, worked with state media to encourage coverage of census issues, gave census presentations to groups around the state, and served as a clearinghouse for census information and materials. In addition, the state sponsored census poster and essay contests for middle and high school students and worked with the Wisconsin Department of Public Instruction and schools statewide to incorporate census lessons into school curricula. The state's matching grant program drew participation from twenty municipalities and associations. These included the cities of Ashland, Beloit, Eau Claire, Green Bay, Janesville, Kenosha, La Crosse, Madison, Milwaukee, Monona, New Berlin, Racine, Stevens Point, Wausau, and West Allis; the counties of Marathon, Milwaukee, Monroe, and Wood; and the Wisconsin Towns Association.

5. To qualify for a matching grant, applicants were required to meet specific population criteria and to develop local campaigns aimed at populations traditionally undercounted in the census. Undercounted groups included: racial and ethnic minorities, persons with limited English-

speaking ability, migrant workers, the homeless, residents of public housing and other concentrations of rental units, students, and individuals who may be outside the mainstream of daily life, such as the elderly or homebound.

6. Local public awareness campaigns covered a wide range of activities involving local businesses, community organizations, government agencies, media, schools, volunteer groups, and others. In some cases, locally produced materials and public service announcements were targeted to specific populations and published in several languages. Posters, billboards, and transit signs were developed in some areas and many communities established census assistance centers to assist resident in completing census forms. Participation in public awareness activities was not limited to those receiving state funds, however, as many associations, business and civic organizations, schools, and community groups statewide included census information in their newsletters, mailings, and presentations.

7. In addition to their involvement in public awareness activities, local governments helped improve the accuracy of the census through participation in several additional programs organized by the Wisconsin State Data Center (DOA-Demographic Services and the University of Wisconsin-Applied Population Laboratory). These programs allocated an additional $30,000 to the state's efforts.

8. Prior to the 1990 headcount, local Wisconsin governments worked with the Census Bureau to confirm and update local boundaries on census maps in an on-going census program known as the Boundary and Annexation Survey (BAS). The last survey occurred in the early part of 1990 when local-government officials were asked to draw their January 1990 boundaries on census maps. These boundaries formed the basis for 1990 census collection and tabulation procedures.

9. Local Wisconsin officials also assisted the Census Bureau by checking the number and location of housing

units in their municipalities through the Census Bureau's Local Review Program. In the Local Review Program, officials were asked to compare census housing unit counts with their own local housing unit estimates and to report inaccuracies to the Census Bureau. Local governments were also asked to report boundary discrepancies found on census maps.

10. During the Pre-Census phase of the Local Review Program in the fall of 1989, local officials compared their housing unit counts to preliminary housing unit counts sent to them by the Census Bureau. The Bureau spent the early part of 1990 reviewing problems and discrepancies reported by local governments and making necessary adjustments before the actual census in April 1990.

11. During the post-census phase of Local Review in the summer of 1990, local Wisconsin officials received the 1990 Census housing unit counts for their areas, along with corresponding maps, and were again asked to compare these with local sources of information and to report problems to the Census Bureau. In early fall of 1990, Census District Offices conducted field and office checks to remedy discrepancies reported by local governments, improving the accuracy of the 1990 Census results.

12. Local Wisconsin officials began preparing for participation in the Local Review Program in 1987 when the Wisconsin State Data Center conducted Local Review training sessions throughout the state. These sessions were repeated in the fall of 1989 and again in the summer of 1990. Over twenty-four training sessions were held and hundreds of local of officials attended.

13. Wisconsin led the rest of the United States in the percentage of residents who voluntarily completed and returned their census questionnaires during the 1990 decennial census. By April 23, 1990, Wisconsin had a 76.2% response rate, compared to approximately 65% nationally.

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IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

AFFIDAVIT OF GEORGE HUMPHREYS

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

George G. Humphreys, of lawful age and being first duly sworn upon oath, states:

1. I am Research Director, Oklahoma House of Representatives, a position I have held since 1985. I worked with the Oklahoma legislative leadership to preplan and carry out the adoption of appropriate legislation to accomplish reapportionment and redistricting following the 1990 census. I was responsible for selecting and training research staff, proposing a budget, making recommendations for acquiring computer hardware and software necessary to accomplish the redistricting, assisting in bill drafting, and in general preparing for and implementing changes in political districts that would result from the 1990 census.

2. For two years before becoming Research Director, I was the Information Service Director for the Oklahoma Department of Economic and Community Affairs, supervising the State Data Center. In that capacity I worked closely with Data Center staff in coordinating pre-census planning for Oklahoma with Census Bureau officials and in applying census data to use in Oklahoma.

3. Article V, Section 11A of the Oklahoma Constitution requires the state legislature to redistrict during the first regular session following a decennial census and to complete redistricting within ninety legislative days. The legislative redistricting requires the determination of boundaries for approximately 100 (101 in the 1991 plan) house districts and forty-eight senate districts. In addition, the boundaries of the federal congressional districts certified by the Clerk of the U.S. House of Representatives to Oklahoma following the decennial census must be determined.

4. In anticipation of redistricting after the 1990 census, I began hiring research staff for the House of Representatives in 1989. Eventually, four full-time staff persons and a computer consultant were hired to assist the leadership of the House on redistricting. A similar number of staff were involved on the Senate side. In addition to staff hired and consultants contracted for the effort, my supervisor, one of our staff attorneys, and I devoted considerable time to the project. Due to a lack of space in the State Capitol, the House of Representatives had to lease office space outside the Capitol and develop costly telecommunications linkages between that office and the legislative host computer where the data resided. In 1989, the State of Oklahoma contracted for the computer hardware and software to process the census data for congressional reapportionment and state redistricting. The software was tested for several months to insure accurate data processing.

5. Between October, 1989 and January, 1990, we participated in the Census Bureau's Phase 2 project to draw county precinct lines on Census Bureau maps. Boundary descriptions for thousands of voting tabulation districts (i.e., precincts) obtained from election boards in the seventy-seven counties in Oklahoma were entered into the state data base. Census Bureau Phase 2 maps were prepared, checked, corrected, and forwarded to the Census Bureau so that population counts could be re-

ported for the state by precinct. The legislature used the precincts as the basis for its reapportionment and redistricting plans.

6. Reapportionment committee chairmen in both the House of Representatives and Senate were selected during the 1989 legislative session and the committees were appointed in 1990. The committees adopted rules (e.g., tolerances in data, acceptable variance in size of legislative districts) and established timetables for consideration and passage of reapportionment and redistricting legislation. Committees in both houses conducted a dozen public hearings across Oklahoma in late 1990 and early 1991 in which public input regarding the redistricting process was sought.

7. Census data became available to Oklahoma on February 13, 1991. My staff and I worked closely with the Reapportionment Committee and leadership of the House of Representatives to draw up House district boundaries so that no House district varied in population from any other district by more than three percent. During approximately three months from February through May, 1991, our office produced hundreds of maps for review and consideration. Several thousand man-hours of time were spent by legislators, legislative leaders, and staff in processing census data to develop reapportionment and redistricting plans acceptable to both the Legislature and the Governor.

8. Congressional reapportionment was achieved with remarkable accuracy: Five Congressional districts in Oklahoma have identical populations, the sixth district has one more person than the other five.

9. The Oklahoma legislature completed the reapportionment and redistricting as required by the Oklahoma Constitution. Congressional reapportionment was enacted through S.B. 301 (Okla. Sess. Laws Ch. 260, §§ 1-8) on May 27, 1991. H.B. 1001 for redistricting the House of Representatives (Okla. Sess. Laws Ch. 189, §§ 1-9)

and S.B. 300 for redistricting the Senate (Okla. Sess. Laws Ch. 193, §§ 1-8) were signed into law by the Governor on May 15, 1991. A few errors in H.B. 1001 were corrected in S.B. 302, signed by the Governor on June 4, 1991 (Okla. Sess. Laws Ch. 311, §§ 1-10).

10. The Oklahoma legislature adjourned, as it was required to do by the Oklahoma Constitution, on May 31, 1991.

11. After the end of the legislative session, my staff and the Senate staff worked with officials in the seventy-seven counties in Oklahoma to redraw district boundaries for the three County Commissioners in each county. Under H.B. 1111 (Okla. Sess. Laws Ch. 185, §§ 1-2), each county had to be redistricted by the October 1 following publication of census data into three commissioner districts having populations as equal as practical. Commissioner districts were required to follow clearly visible, definable boundaries based on criteria established by the Census Bureau for recognizing census geography. We also prepared legal descriptions for the new state house districts and worked with the Department of Transportation in producing county maps that were used by county election boards in all seventy-seven counties. That task took approximately four months and the new precincts were used in the March 10, 1992 vote in Oklahoma's presidential preferential primary.

12. Oklahoma expended well over $1 million in accomplishing redistricting during 1991.

13. The Oklahoma legislature convened its 2nd Regular Session of the 43rd Legislature on February 3, 1992. It is scheduled to adjourn no later than May 29, 1992.

14. Candidates for all seats in the U.S. House of Representatives, Oklahoma House of Representatives, and half of the state Senate seats will file their declarations of candidacy pursuant to the 1991 district plans July 6-8, 1992. Primary elections for all contested seats in the U.S. House of Representatives, Oklahoma House of Representatives, and half the seats in the Oklahoma

Senate, based on the new district plans, as well as numerous offices at the county level, will be held on August 25, 1992. Run-off elections as needed will be conducted on September 15, 1992, and the general election will be on November 3, 1992. By law, the persons who will be sworn in as members of the Oklahoma Legislature and the Oklahoma delegation to the new Congress will have been elected pursuant to the 1991 redistricting and reapportionment plans.

15. If an adjustment is made statistically in the census data which have already been used to draw political boundaries in Oklahoma, it will not be possible to revise those boundaries again before candidates file for office and the elections are conducted. Once it adjourns at the end of May, 1992, the Oklahoma legislature will not convene again in regular session until February 1, 1993, when the 1st Regular Session of the 44th Legislature will begin.

16. It is not clear under the Oklahoma Constitution who would be responsible for reapportionment and redistricting if an adjustment to the census data were now made statistically. Oklahoma Constitution, Article V, § 11A provides that if "the Legislature shall fail or refuse to make such apportionment" within the first legislative session after the census is taken, the reapportionment would be accomplished by a commission composed of the Attorney General, the Superintendent of Public Instruction, and the State Treasurer. Neither Section 11A nor related sections specifies any timetable for the Apportionment Commission to file its order of apportionment. The Oklahoma Constitution did not contemplate adjustments to census data after their submission by the Department of Commerce to the President. In Section 3 of H.B. 1001, by which redistricting of the Oklahoma House of Representatives was accomplished, the legislature declared its intent in light of possible adjustment:

> SECTION 3. For purposes of compliance with Section 11A of Article 5 of the Oklahoma Constitution requiring apportionment within ninety (90) legislative days after the convening of the First Regular Session of the Legislature following each Federal Decennial Census, the Legislature declares, pursuant to this act, that the Legislature has accomplished the apportionment of the State House of Representatives within the required time following the submission by the United States Department of Commerce to the President of the 1990 decennial census population counts on December 26, 1990. Such counts, however, were transmitted with a caveat that the counts were subject to possible corrections for undercount or overcount by the United States Department of Commerce. Therefore, it is the intent of the Oklahoma Legislature that should an adjustment of the population counts for Oklahoma occur, the Oklahoma Legislature reserves the right to revise, if necessary, the apportionment of the State House of Representatives provided by this act to ensure substantive equality of population among the districts.

However, there is no precedent of which I am aware by which we can know for certain whether the legislative apportionment accomplished in 1991 would satisfy the constitutional requirements of Article V, § 11A, despite the legislative declaration of intent. In my opinion, statistical adjustment of the census data would in all probability result in litigation in Oklahoma regarding who has authority to redo the reapportionment using adjusted data or whether the officials elected pursuant to the 1991 plans were elected pursuant to valid plans. A statistical adjustment would, in all probability, subject the Oklahoma congressional apportionment plan to litigation. The adjustment would create inequalities in district populations that would make the 1991 plan subject to a court challenge

if an alternative plan could be presented to a court with lower population variations.

/s/ George G. Humphreys
GEORGE G. HUMPHREYS

[Notary Omitted in Printing]

SUPREME COURT OF THE UNITED STATES

No. 94-1614

WISCONSIN, PETITIONER

v.

CITY OF NEW YORK, ET AL.

ORDER ALLOWING CERTIORARI

Filed September 27, 1995

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. This case is consolidated with 94-1631, *Oklahoma v. City of New York, et al.* and 94-1985, *Department of Commerce, et al. v. City of New York, et al.* and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply.

September 27, 1995

SUPREME COURT OF THE UNITED STATES

No. 94-1631

OKLAHOMA, PETITIONER

v.

CITY OF NEW YORK, ET AL.

ORDER ALLOWING CERTIORARI

Filed September 27, 1995

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. This case is consolidated with 94-1614, *Wisconsin v. City of New York, et al.* and 94-1985, *Department of Commerce, et al. v. City of New York, et al.* and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply.

September 27, 1995

SUPREME COURT OF THE UNITED STATES

No. 94-1985

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ORDER ALLOWING CERTIORARI

Filed September 27, 1995

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. This case is consolidated with 94-1614, *Wisconsin v. City of New York, et al.* and 94-1631, *Oklahoma v. City of New York, et al.* and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply.

September 27, 1995

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Nos. 94-1614, 94-1631, 94-1985

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PETITIONER STATE OF WISCONSIN

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STATE OF OKLAHOMA, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

UNITED STATES DEPARTMENT
OF COMMERCE, et al., *Petitioners,*

v.

CITY OF NEW YORK, et al., *Respondents.*

QUESTION PRESENTED

Whether the July 15, 1991, decision of the Secretary of Commerce not to substitute statistically adjusted census numbers for the 1990 decennial census totals previously reported by the President for the reapportionment of Congress and transmitted to the states for use in redistricting was consistent with the language of the Constitution and the constitutional goal of equal representation.

LIST OF PARTIES

The parties to the proceeding in the court of appeals were the City of New York; State of New York; City of Los Angeles; City of Chicago; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; City of Atlanta, Georgia; Maynard Jackson, individually and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernardino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona, and Council of Great City Schools; the United States Department of Commerce; Ronald H. Brown, Esq., as Secretary of the United States Department of Commerce; Michael R. Darby, as Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Barbara Everitt Bryant, as Director of Bureau of Census; William J. Clinton, as President of the United States; Donnald K. Anderson, as Clerk of the United States House of Representatives; Michael Espy, as Secretary of Agriculture; Donna E.

Shalala, as Secretary of Health & Human Services; Henry Cisneros, as Secretary of Housing & Urban Development; Robert B. Reich, as Secretary of Labor; Federico Pena, as Secretary of Transportation; Richard W. Riley, as Secretary of Education; State of Wisconsin and State of Oklahoma.

The People of the State of California *ex rel.* Daniel E. Lungren, Attorney General, and County of Hudson, New Jersey, were parties to the proceedings in the district court, whose judgment was vacated by the court of appeals, but were not parties to the proceeding in the court of appeals.

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The opinion of the court of appeals (Pet. App. 1-40)[1] is reported at 34 F.3d 1114 (2d Cir. 1994). The opinions of the district court (Pet. App. 41-95, 96-120, 121-34) are reported at 822 F. Supp. 906, 739 F. Supp. 761 and 713 F. Supp. 48. The decision of the Secretary of Commerce (Pet.-App. 135-415) is published at 56 Fed. Reg. 33582.

JURISDICTION

The judgment of the court of appeals was entered August 8, 1994. The State of Wisconsin petitioned for rehearing on August 22, 1994, which was denied on January 4, 1995 (Pet. App. 416-18).[2] Wisconsin filed a petition for writ of certiorari in No. 94-1614 on April 3, 1995. Oklahoma filed a petition for writ of certiorari in No. 94-1631 on April 4, 1995. On March 27, 1995, Justice Ginsburg extended the time for the Government's filing of a petition for writ certiorari to and including May 4, 1995. On April 25, 1995, Justice Ginsburg further extended the time within which to file to and including June 3, 1995. On June 3, 1995, the Solicitor General filed a petition for writ of certiorari in No. 94-1985. The petitions were granted on September 27, 1995, and the cases were consolidated (J.A. 109-111). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are U.S. Const. art. I, § 2, cl. 3, *amended by* U.S. Const

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[1]References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 94-1614.

[2] The State of Oklahoma's petition for rehearing was denied on December 12, 1994 (Pet. App. 419-21).

amend. XIV, § 2; U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; and U.S. Const. amend. XV, § 1. Statutes involved are 2 U.S.C. § 2a, 13 U.S.C. § 141 and 13 U.S.C. § 195. The pertinent text of these provisions is set forth at Pet. App. 422-27.

STATEMENT OF THE CASE

This case concerns claims that the United States Constitution mandates the use of specific methodological innovations in taking the decennial census.

In October 1987, the Department of Commerce announced its decision that it would not attempt to statistically adjust the results of the 1990 census, as it had also decided with respect to the 1980 census. Litigation regarding the 1980 census ended in December, 1987, with the decision in *Cuomo v. Baldrige*, 674 F. Supp. 1089 (S.D.N.Y. 1987), upholding the census. In November, 1988, New York City, Los Angeles, Chicago, Dade County, Florida and the states of New York and California, joined by several interest groups and individuals, filed suit to compel the Department of Commerce and the Census Bureau to undertake statistical estimation procedures designed to "correct" anticipated errors in the 1990 decennial census, this time venuing the action in the Eastern District of New York (R. 1).[3] Plaintiffs' complaint alleged that the census as planned would result in an undercount of the population, that the undercount would be differentially concentrated among racial and ethnic minorities and that, as a result, states and cities with large

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[3]New Jersey, Florida, Texas, New Mexico, Arizona and the District of Columbia subsequently joined the suit as plaintiffs-intervenors (R. 130, 145, 161, 206, 207, 223). Following the July 15, 1991, decision of then-Secretary of Commerce Robert Mosbacher not to adjust the results of the 1990 census, Wisconsin and Oklahoma intervened as defendants (R. 213, 276). Two related district court actions, *City of Atlanta v. Mosbacher*, No. 92-CV-1566 (N.D. Ga.), and *Florida House of Representatives v. Franklin*, No. 92-CV-2037 (N.D. Fla.), were later consolidated with the New York proceedings (R. 323. 332).

minority populations would be undercounted relative to other states and regions, causing a loss in representation and in census-based allocations of federal monies (J.A. 44-45, 48). Plaintiffs alleged that post-census statistical estimation techniques provided a feasible method for correcting the anticipated undercount (*id.* at 46-47). The failure to employ this specific census procedure was alleged to violate U.S. Const. art. I, § 2, by failing to conduct "the most accurate census practicable," and to discriminate "with respect to fundamental rights against individuals residing in legislative districts that are disproportionately undercounted," in violation of Fifth Amendment equal protection guarantees (J.A. 48). Plaintiffs did not contend that the differential undercount resulted from a discriminatory purpose or that, given the Census Bureau's decision to adhere to an "actual enumeration," the Bureau would not attempt "to arrive at as accurate a figure as humanly possible" (Pet. App. 99). Statutory claims were asserted under 2 U.S.C. § 2a, 13 U.S.C. § 141 and the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (J.A. 48-49). Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1337, 1361, 2201, 2202 and 5 U.S.C § 702 (J.A. 40).

A. Stipulation to Conduct Post-Enumeration Survey.

Following the district court's denial of the Government's motion to dismiss and motion for summary judgment (Pet. App. 121-34), the parties entered a stipulation, approved by the court on July 17, 1989, under which the Secretary of Commerce agreed to reconsider *de novo* whether to carry out a statistical adjustment of the 1990 census (J.A. 61-67). The stipulation required that the decision be made by July 15, 1991, and in accordance with published guidelines articulating the relevant technical and

nontechnical statistical and policy grounds for the decision (*id.* 62-63).[4]

The Census Bureau went forward as planned with the vast statistical undertaking of attempting to count every person living in the United States as of April 1, 1990, resulting in a resident population count of the United States of 248,709,873 and an apportionment count of 249,632,692 (Pet. App. 320). The enumeration process began with the development of comprehensive maps of each block in the United States, the identification of housing units on each block and included pre- and post-census review by state and local governments. The actual enumeration started with the basic mail-out/mail-back procedure, followed by multiple contacts with each household that did not return a census questionnaire, a 100% recheck of vacant or uninhabitable units, a "Were you counted?" advertising campaign, a parolee and probationer check, and a housing coverage check (*see generally id.* at 319-32). Aware of differential census coverage rates for minority populations in earlier censuses, the Census Bureau mounted the most extensive effort ever to enumerate African-Americans and other minorities.[5] State and local governments were free to

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[4]The district court subsequently upheld the guidelines established by the Commerce Department against the plaintiffs' challenge that they violated the stipulation and were biased against adjustment (Pet. App. 110-18). In the same decision, the court granted plaintiffs' declaratory judgment that statistical adjustment would not violate either the Constitution's requirement of an "actual enumeration," U.S. Const. art I, § 2, cl. 3, or 13 U.S.C. § 195 (Pet. App. 107-110). Section 195 of Title 13 of the U.S. Code directs the use of sampling, where feasible, in carrying out the Department's census functions, "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several states . . . ."

[5]As described by Census Director Bryant in her recommendation to Secretary Mosbacher (J.A.76):

encourage census participation. For example, both Wisconsin and Detroit mounted census awareness and outreach campaigns.[6] As subsequently measured by the PES, the 1990 census counted 98.4% of the total population.[7]

Despite this accomplishment, problems remained. The return rate of questionnaires during the initial mail out/mail back phase was only 63% (*id.* at 15, 327-28), although in Wisconsin it exceeded 76%, representing the highest voluntary response rate in the country (J.A. 98; *see also* A.R. App. 6 at 40). Moreover, despite the efforts to enumerate minority residents, the undercount differential was not reduced below historic levels (J.A. 76).

Pursuant to the July 1989 stipulation, the Census Bureau began conducting a Post-Enumeration Survey, or PES, nearly three months after the April 1 census date (Pet. App. 336). The PES procedure consisted of stratifying the population into 1,392 mutually exclusive poststrata defined by geography, race/ethnic group, housing tenure, age and sex (*id.* at 52 n.5, 164). Data obtained from a

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This included the hiring of 280 community outreach workers who worked in communities two years before census taking; involvement of 56,000 community organizations--most minority but also city and state Complete Count Committees; outstanding cooperation from Black and Spanish language media in running public service announcements and programs about the importance of the census; and the hiring of follow-up enumerators from minority populations, bilingual and multi-language enumerators, and residents of public housing projects and American Indian reservations to enumerate persons in their neighborhoods.

[6]*See* J.A. 95-101; Administrative Record ("A.R.") App. 6 at 40 (Wisconsin); Pet. App. 174 (Detroit).

[7]The 1.6% undercount estimate reflects a correction of an original 2.1% estimate resulting from the discovery of a computer coding error and the correction of errors in 104 sample block clusters thought to have a major impact on bias in the original estimates (Tr. 1782-83, 1786-92; DX 31 (Tr. 1790-92)); *see also* 58 Fed. Reg. 69, 73 (Jan. 4, 1993).

sample consisting of roughly 377,000 people (*id.* at 157), or approximately one-sixth of one percent of the national population, were matched to data obtained in the census[8] to estimate census coverage rates for each poststratum (*id.* at 76 n.23, 169-70, 336-40). The overwhelming majority of the nation's 39,000 local jurisdictions were unrepresented in the sample (*id.* at 80, 212; A.R. App. 13[9] at 4). The construction of the PES meant that an average sample of roughly 300 people was used to estimate census coverage rates for each demographic post-stratum (A.R. App. 13 at 3), on average containing roughly 180,000 people. The PES did not sample states individually but aggregated them into nine census divisions (Pet. App. 164, 342-43, 370-72). For example, only 141 blocks from Wisconsin, the least populous state in the East North Central census region, were included in the sample (*id.* at 372). The state's undercount estimate was primarily based on data obtained in 947 blocks sampled in Illinois, Indiana, Michigan and Ohio (*id.* at 371-72). California dominated the sample uses to estimate state populations in the Pacific census division, providing nearly half of the division's 1,390 blocks included in the sample (*id.* at 370-72; *see also* A.R. App. 13 at 3-4). The PES relied on the assumption of sample homogeneity--that persons in each poststratum were homogeneous with respect to their probability of being missed by the census (Pet. App. 79, 205).

Based on the sample observations, as well as the imputation of nearly nine million people for whom match status between census and survey could not be determined (*id.* at 75-76, 170), an estimate of the undercount or overcount rate for each poststratum, called an adjustment factor, was derived using the statistical technique of dual system estimation (*id.* at 340-42). The raw adjustment

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[8]Confusingly referred to as the P-sample (population) and E-sample (enumeration) (Pet. App. 76 n.23). Only one sample was taken.

[9]D. Freedman, *Adjusting the 1990 Census*, 252 Science 1233 (1991).

factors exhibited significantly greater variability than had been anticipated during the design of the PES, and a statistical technique known as "smoothing" was used to reduce this variability (*id.* at 57 n.10, 219-27).

"Selected PES" estimates were completed in June 1991 (A.R. App. 10 (June 13, 1991, Release)). As originally calculated, the PES estimated that the 1990 census had resulted in a 2.1% undercount of the national population (Pet. App. 58). Consistent with earlier studies, coverage rates were found to be disproportionately lower for racial and ethnic minorities, estimated to range from 94.8% for Hispanics to 98.8% for non-Hispanic whites (*ibid.*). Coverage rates also varied by state, although the relation between minority and state undercounts was often counter-intuitive.[10] The June 1991 undercount estimates for every state in the New England, Middle Atlantic, East North Central and West North Central census regions were below the national average, meaning that each state in the Midwest and Northeast, including the plaintiffs New York and New Jersey, would lose population as a percentage of the national population under the adjusted numbers (A.R. App. 10, Tables 1, 5 (June 13, 1991, Release)). Had the June 1991 estimates been used as the apportionment census, California and Arizona would have each gained, and Wisconsin and Pennsylvania would have each lost, one seat in the House of Representatives (Pet. App. 17).

B. The Secretary's Adjustment Decision.

On July 15, 1991, then-Commerce Department Secretary Mosbacher announced his decision not to adjust

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[10]For example, Montana, Idaho and Wyoming were each reported to have undercount rates roughly double those estimated for New Jersey, Michigan and Illinois (A.R. App. 10, Table 1). Rhode Island's estimated undercount of 0.3%, the lowest in the country, was one-fourth the undercount for non-Hispanic whites nationally (*ibid.*).

the 1990 census[11] (Pet. App. 135-415). Explaining his decision, Secretary Mosbacher stated that he was deeply troubled by the persistence of a differential undercount of minority populations and expressed regret that adjustment was unable to address this problem without adversely affecting the integrity of the census (*id.* at 138-39). The Secretary acknowledged that a statistical adjustment would likely increase the "numeric accuracy" of the census (*id.* at 184-85, 200). He explained, however, that the constitutional purpose of the census was not simply to count the total number of people in the United States but to locate them so that political representation could be allocated to the states and to their residents in proportion to their numbers. Accordingly, he concluded that the primary criterion for accuracy should be distributive rather than numeric accuracy (*id.* at 200-201). The Secretary found that while the adjusted numbers appeared to come closer to giving the nation's total population than the enumeration census, the census numbers displayed greater distributive accuracy than the adjusted counts and represented the most accurate count of the population of the United States at the state and local levels (*ibid.*).

The Secretary's statistical evaluation of the competing census results (adjusted and unadjusted) was

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[11]A Special Advisory Panel appointed to advise the Secretary on the adjustment decision pursuant to the July 1989 stipulation split evenly in recommending in favor of and against adjustment, with all of the members nominated by the plaintiffs recommending adjustment (Pet. App. 59). Based on the Census Bureau's "loss function" analysis, a majority of the Census Bureau's Undercount Steering Committee supported the adjusted numbers as being the more accurate (*id.* at 59). The late discovery of an error in the calculation of loss function values was subsequently reported to weaken, but not change, the majority's conclusion (*id.* at 190-91, 244-45). While recommending in favor of adjustment, the Director of the Census Bureau also recognized that "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree" (J.A. 73). The Under Secretary for Economic Affairs and the Administrator of the Economics and Statistics Administration recommended against adjustment (Pet. App. 59).

highly technical and comprehensive. The Secretary expressed concern regarding the introduction of errors in the PES in the process of attempting to determine whether people included in the sample had been counted in the census. He noted that for 1.7% of the P-sample and 2.1% of the E-sample, match status could not be resolved and had to be imputed using a logistic regression model. When weighted up to the national population, imputed matches represented nearly nine million people, a number almost twice as large as the estimated net national undercount (*id.* at 75-76, 170).

The Secretary also found troubling the large measured bias in the PES estimates. At the time of the July 1991 adjustment decision, preliminary results of the Census Bureau's total error model indicated that the PES was biased towards overestimating the undercount and that a biased-corrected estimate would be about 1.4% rather than the estimated 2.1%. This meant that roughly a third of the net undercount adjustment came from bias in the PES. Biases in the PES also tended to be higher for minority evaluation strata (*id.* at 180). In addition, the Secretary concluded that uncertainty about the true variance of the adjusted figures meant that even their superior numeric accuracy had not been definitively demonstrated (*id.* at 201). The Secretary found that the loss function analyses and hypothesis tests that had been prepared by the Census Bureau at the time of the adjustment decision supported the superior accuracy of the census counts, when distributive accuracy was considered and when reasonable estimates of the error variance of the alternative DSE were used (*ibid.*). Noting that the results of PES evaluation studies had not been completely analyzed by the time of the decision and that the statistical tools used to calculate and evaluate the adjusted counts were at the cutting edge of statistical research, Secretary Mosbacher expressed deep concern that if an adjustment were made, it would be on the basis of research conclusions that might well be reversed in the next several months (*id.* at 248).

The Secretary also identified substantial evidence which cast doubt on the homogeneity assumption underlying the entire synthetic adjustment methodology (*id.* at 204-13). In addition, the Secretary reported that small changes in adjustment methodology were capable of moving seats in the House of Representatives (*id.* at 228). The single methodological decision to exclude 28 out of 1,392 variance outliers during the process used to "smooth" the raw adjustment factors was alone sufficient to shift a House seat from Pennsylvania to Arizona (*id* at 220). One member of the Special Advisory Panel had calculated the states' populations using five modifications to the PES's modeling assumptions. Each produced a different apportionment of Congress (*id.* at 218). The Secretary identified "the bundle of statistical techniques contained in the smoothing process" as one of the most problematic aspects of the adjustment process (*id.* at 228), finding that the techniques relied heavily on statistical assumptions, resulted in large changes in adjustment factors and might very well have led to an overstatement of the undercount (*id.* at 219-28).

In addition to concluding that the adjusted numbers did not improve, but more likely worsened, the distributional accuracy of the census, the Secretary identified policy considerations militating against adjustment. The sensitivity of the PES results to modeling assumptions not only impaired their usability but opened the census to the risk of political manipulation (*id.* at 213-28). Statistical estimation also undermined incentives to future census participation, including state and local support for future censuses (*id.* at 228-38). Adjustment also risked significant disruption to the orderly transfer of political representation that would result from changing the census numbers already reported by the President for the apportionment of Congress and used by the states in redistricting (*id.* at 249-56).

C. District Court's Decision Upholding Adjustment Decision.

Following the Secretary's decision, the district court permitted extensive discovery and then set the case for trial. The 13-day trial consisted almost exclusively of expert demographic and statistical testimony and produced thousands of pages of exhibits (Pet. App. 60-61). Evidence was presented that in attempting to correct for bias in the original PES estimates, the Census Bureau discovered errors whose correction reduced the national undercount estimate to 1.6% (Tr. 1786-87, 1790-91; DX 31 (Tr. 1790-92)); *see also* 58 Fed. Reg. 69, 73 (Jan. 4, 1993). Correction of these errors changed state undercount estimates as well, but not uniformly.[12] Less technical evidence regarding Wisconsin's experience in the census and the disruption adjustment would cause to Oklahoma's redistricting process was submitted by stipulation and affidavit (J.A. 95-101, 102-108). On April 13, 1993, the district court issued a decision upholding the Secretary's decision against adjusting the 1990 census (Pet. App. 43-95). The court also ordered the release of block-level adjusted census data to the plaintiff states (*id.* at 91-95).

The district court adhered to its earlier ruling that the Secretary's decision would be reviewed under the APA's arbitrary and capricious standard (*id.* at 63-66; *see also id.* at 129-33). The court agreed with the Secretary's decision to focus on distributive, rather than numeric, accuracy, given the census's function in distributing political representation and economic benefits

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[12]New Mexico's estimated undercount fell by the largest amount, 1.44%. Both Arizona's and California's undercount estimates were reduced by 0.92%, which, in the case of California, would have represented nearly 275,000 people. New Hampshire's undercount increased by 0.22%. New Jersey's estimated undercount fell to 0.57%, more than a percentage less than the revised national undercount. Pennsylvania's undercount estimate was reduced by 0.34%, while Wisconsin's was reduced by 0.06% (DX 31, Attachment 4).

(*id.* at 77-78). The court engaged in a detailed review of the adjustment decision under each of the Department's eight published guidelines (Pet. App. 69-89).[13] While finding the adjustment decision reasonable under each of the guidelines, the court commented, with little explanation, that were it "called upon to decide this issue *de novo*, I would probably have ordered the adjustment" (*id.* at 89). Nevertheless, the court agreed with one of the Census Bureau's principal statisticians that "'reasonable statisticians could differ on this conclusion'" (*id.* at 91), concluding that the Secretary's decision had been neither arbitrary nor capricious (*ibid.*).

D. Court of Appeals' Decision.

All of the plaintiffs except California and Hudson County, New Jersey, appealed the district court's decision, arguing that because the case involved constitutional claims, it should be remanded for *de novo* review. On August 8, 1994, a divided panel of the United States Court of Appeals for the Second Circuit ruled that the judgment of the district court be vacated and the case remanded for further proceedings to determine whether the decision not to adjust was essential to the achievement of a legitimate governmental interest (*id.* at 4, 39-40).

The court first rejected Wisconsin's and Oklahoma's argument that statistical estimation of the apportionment census was barred by the statutory exception to sampling in the apportionment census contained in 13 U.S.C. § 195 (*id.* at 23-25). The court then reviewed the constitutionality of the adjustment decision under equal protection standards made applicable to the federal

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[13]Guideline One "mandate[d] that the actual count be considered the most accurate count of the population 'at the national state and local level, unless an adjusted count is shown to be more accurate'" (Pet. Ap. 71-72). The court found that the plaintiffs had failed "to illustrate affirmatively the superior accuracy of the adjusted counts either (1) at any level mentioned in Guideline One, or (2) for any reasonable definition of accuracy" (*id.* at 78).

government by the Fifth Amendment (*id.* at 31-33). The court interpreted the district court's decision as having "implicitly found that the census did not achieve equality of voting power as nearly as practicable" (*id.* at 34). The court also characterized the decision to adhere to an acknowledged undercount as one which "disproportionately denies representation on the basis of race or ethnicity" (*ibid.*). Both consequences were identified as requiring heightened constitutional scrutiny (*id.* at 33-34).

Under established congressional redistricting standards, the court of appeals noted that once a plaintiff had shown "that a scheme was not the product of a good-faith effort to achieve equality, 'the burden shift[s] to the [governmental entity] to prove that the population deviations in its plan were *necessary* to achieve some legitimate state objective'" (*id.* at 37 (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (emphasis added)). The court held that "the findings of the district court . . . plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable" (*id.* at 38). In particular, the court identified the Secretary's acknowledgement that the adjusted numbers would likely make the census more accurate nationally and reduce the disparate impact of census inaccuracies on minority groups (*ibid.*). The court pointed to the Secretary's valuing distributive over numeric accuracy, his concerns regarding potential manipulation of, and disincentives to, participation in future censuses and the foreseeability of the differential undercount as further evidence of his failure to make the required good faith effort (*id.* at 38-39). Summarizing, the court stated "that plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable" (*id.* at 39). The court's only conclusion regarding the adjustment decision's effect on equality of representation in Congress was in its characterization of the Secretary's decision as "declin[ing] to make the generally improving

adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate" (*id.* at 38). Other than noting that census inaccuracies could affect equality in intrastate redistricting (*id.* at 33), the court did not discuss the adjusted and unadjusted numbers' impact on equality in state-created congressional and legislative districts. Stating that the proper standard of review was not the arbitrary and capricious standard but the "more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity" (*id.* at 39-40), the court held that the burden shifted to the Secretary to show that the result of undercounting minorities furthered a legitimate governmental objective and was essential for the achievement of that objective (*id.* at 40).

Dissenting, Judge Timbers endorsed the thoroughness and reasoning of the district court's opinion and noted the conflict created by the court of appeals' decision with decisions of the Sixth and Seventh Circuits in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992) (Pet. App. 40).

SUMMARY OF ARGUMENT

1. *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2777 (1992), held that census decisions affecting the apportionment of Congress will be reviewed for consistency with the language of the Constitution and the constitutional goal of equal representation. In this case, plaintiffs' claim was not that a census procedure was constitutionally proscribed, as was asserted in *Franklin v. Massachusetts*, but that the Constitution mandated the use of additional procedures--here, statistical estimation techniques--in taking the 1990 census. Plaintiffs alleged that this methodological innovation was capable of

"correcting" unintended errors in the census potentially having representational consequences. The issue of whether the Secretary acted constitutionally in not substituting statistically adjusted census results for the population totals previously reported by the President and provided to the states is framed by the broader question of whether the Constitution recognizes a judicially enforceable right to specific census innovations which are claimed necessary to achieve the "most accurate census practicable."

Wisconsin submits that at least where the procedures selected for taking the census do not represent a retreat from past efforts to take an accurate census, the Constitution does not create an entitlement to specific, previously untried, census innovations. The recognition of a judicially enforceable right to the most accurate census practicable conflicts with Congress' express constitutional and historically exercised authority to direct the manner of taking the census. U.S. Const. art. I, § 2, cl. 3. There is a fundamental difference between constitutionally proscribed census decisions and constitutionally mandated procedures. There are many procedures capable of improving census accuracy. No matter what procedures are selected, there will always be other procedures capable of producing a more accurate census. A standard of consistency is not a standard of mandated actions. As reflected in the Constitution's grant of congressional authority to determine the best way of taking the census, the choice of census procedures is an inherently legislative function involving complex technical and policy trade-offs, often entailing resource allocation decisions. As two decades of protracted litigation demonstrate, determining the impact of adopting a given census procedure on equality of representation rests on complex and highly uncertain predictions.

Recognizing a judicially enforceable right to procedures claimed necessary to achieving the most accurate census practicable creates an unworkable system of census governance. The census is a process intended to

confer finality and certainty in the decennial reallocation of rights of political representation. The strict statutory timetable established for taking, completing and reporting the census and for reallocating rights of representation in the national government based on its results reflects the need for finality. Claims to specific census innovations which result in litigation spanning more than half the decade can have no other consequence than to throw into disarray the already-completed process of state redistricting. Recognizing a constitutional entitlement to specific census innovations threatens the Balkanization of census decisions, as states forego Congress in favor of individual district court actions, to secure those procedures viewed as conferring the greatest benefit in the count. That census decisions have representational consequences is a truism. Yet, as recognized by the Seventh Circuit, claims to specific census innovations do "not ask [courts] to decree equality. . . . [but] to take sides in a dispute among statisticians, demographers, and census officials . . . ." *Tucker*, 958 F.2d at 1418. Simply by directing apportionment in accordance with the decennial census, "Article I, section 2, clause 3 does not authorize law suits founded on disagreement with the Census Bureau's statistical methodology." *Ibid.*

2. In this case, the Second Circuit erred in concluding that the Secretary had failed to make a good-faith effort to achieve equality of representation as nearly as practicable and that the census denied representation on the basis of race or ethnicity. Because these conclusions were wrong, the court erred in holding that the adjustment decision was to be reviewed under heightened equal protection standards.

The application of Art. I, § 2 redistricting standards to census decisions is problematic. Good faith in redistricting reflects the objective feasibility of creating equal population districts, measured by a "relatively rigid mathematical standard," *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 464 (1992). Here, the Secretary

was faced with a myriad of complex statistical arguments regarding the relative distributional accuracy of two imperfect sets of census results, making the substitution of census numbers technically and constitutionally perilous. Because the constitutional purpose of the census is to allocate rights of political representation based on the distribution of the population among and within the states, the Secretary's focus on distributive, rather than numeric accuracy, did not demonstrate an absence of good faith, but the opposite.

The court of appeals wrongly concluded that the district court had "implicitly found" that the census failed to achieve equality of representation as nearly as practicable. With respect to the census's impact on intrastate redistricting, the court of appeals failed to recognize the plaintiffs' ability to use the adjusted numbers for redistricting subsequent to the district court's ordering the data's release. With respect to the census's impact on equality in the apportionment of Congress, the Second Circuit's characterization of the PES apportionment as "just as accurate" as the census apportionment meant that plaintiffs had not met the threshold burden, required even in Art. I, § 2 redistricting cases, of demonstrating improved equality of representation in Congress. *Karcher v. Daggett*, 462 U.S. at 730-31. Plaintiffs' failure to meet this burden was also reflected in the district court's express finding that they had failed to demonstrate the superior accuracy of the adjusted numbers at the national, state or local level and for any reasonable definition of accuracy.

The Second Circuit's concern regarding the differential undercount of minority populations was understandable but did not support its conclusion that the census denied representation on the basis of race or ethnicity. Representatives in Congress are apportioned to states, not to racial or ethnic groups. The question of whether the census denies representation on the basis of race or ethnicity is the same as whether the apportionment of Congress is wrong. Unless this is demonstrated, shifting seats in the House of Representatives from states with

relatively small, to states with relatively large, minority populations accomplishes nothing more than an arbitrary reallocation of rights of political representation.

3. Under *Franklin v. Massachusetts*' standard of consistency with the language of the Constitution and the constitutional goal of equality of representation, the Secretary's decision was constitutional. Plaintiffs did not contend that adherence to the 200-year practice of actual enumeration was inconsistent with constitutional text or history. Conflicts with constitutional language and principles were, however, present in the PES. The substitution of the estimates for the reported census would have disrupted on-going state redistricting efforts, a result conflicting with both the goal of equal representation and the need for census finality. State estimates were based on samples taken in other states, conflicting with the constitutional requirement that Congress be apportioned on the basis of each state's population. U.S. Const. art. I, § 2, cl. 3; amend. XIV, § 2. By removing the incentive to take part in the census, estimation would make future censuses more difficult to conduct, also hindering the goal of representational equality by causing future inaccuracies. More broadly, estimation acquiesces in citizen non-participation in the processes of self-government, particularly among those groups which have been least included in the political process. Vulnerable to political manipulation and producing highly unstable results, statistical estimation undermines the perception of legitimacy in the allocation of rights of political representation among and within states.

The Secretary's decision was consonant with the goal of equality of representation. Very serious concerns existed regarding the quality of the PES estimates, particularly as affecting their distributional accuracy. The district court held that the Secretary's comprehensive evaluation of the technical and policy issues bearing on adjustment had been reasonable. In this circumstance, the choice of census results was one necessarily "command[ing]

far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. The adjustment decision was constitutional.

ARGUMENT

I. THE RECOGNITION OF CLAIMS OF CONSTITUTIONAL ENTITLEMENT TO SPECIFIC CENSUS INNOVATIONS CONFLICTS WITH CONGRESS' CONSTITUTIONAL AUTHORITY TO DIRECT THE MANNER OF TAKING THE CENSUS AND CREATES AN UNTENABLE SYSTEM OF CENSUS GOVERNANCE.

A. Article I, § 2, cl. 3 (The Apportionment Clause), as amended by Section 2 of the Fourteenth Amendment, provides for the apportionment of Representatives in the House of Representatives among the states "'according to their respective Numbers,'" and directs that the "actual Enumeration" be taken every ten years, "in such Manner as [Congress] shall by Law direct." With the adoption of the Sixteenth Amendment, the census has the single constitutional purpose of providing the states' populations for apportioning Congress. *Carey v. Klutznick*, 653 F.2d 732, 736 (2d Cir. 1981), *cert. denied*, 455 U.S. 999 (1982).

Montana, 503 U.S. at 457-58, held that decisions affecting the apportionment of Congress are justiciable. *Franklin v. Massachusetts* extended this holding to census decisions affecting the apportionment, 112 S. Ct. at 2776 n.2, stating that census decisions would be reviewed under a standard of consistency with the language of the Constitution and the constitutional goal of equal representation. *Id.* at 2777. The specific question in this case is whether the Secretary's decision not to substitute statistically estimated population totals for the 1990 census was consistent with constitutional text and

principles. That issue is framed by the broader question of whether the Constitution mandates the adoption of specific census innovations claimed to be necessary to achieve the most accurate census practicable.

The recognition of a judicially enforceable right to compel specific census innovations conflicts with the Constitution's express grant of congressional authority to direct the manner of taking the census and Congress' historic exercise of that authority. If courts are to decide which procedures will achieve the most accurate census practicable, then unless Congress directs that the census be taken in a manner that a court agrees will achieve the greatest practicable accuracy, Congress' decision will be unconstitutional.[14] While not stated, the recognition of a constitutional right to specific census procedures necessarily assumes some basic institutional inability on the part of Congress to address problems in the census and to direct the taking of an accurate census. This is to say that the Founders of the Constitution erred in allocating this constitutional function to the Legislative Branch. Yet there appear to be few, if any, historical examples to support this view. To the contrary, in 200 years, the decennial census has evolved into a highly professional, methodologically sophisticated and costly operation which each decade attempts to count a larger proportion of the population. While the census continues to contain unintended errors, this case is not in the realm of the embedded and extreme inequality presented in *Baker v. Carr*, 369 U.S. 186 (1962).

Plainly, there are a number of census decisions which would be constitutionally proscribed as inconsistent with constitutional language or the goal of equal

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[14]This view is reflected in *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982), in which the question of whether the Constitution required an adjustment in the official population counts to reflect the differential undercount of minorities was held "not for the Congress, but for the judiciary."

representation. Conducting the census in a year not evenly divisible by ten, U.S. Const. art. I, § 2, cl. 3, assigning overseas military personnel to states based on place of birth, rather than "home of record" or other measure of current state ties,[15] delaying the reporting of census results until after the subsequent congressional elections or so late in the election cycle as to prevent their being used to reapportion Congress, or directing that census enumerators engage in substantially less canvassing of minority neighborhoods, are examples of census decisions which would be inconsistent with the language of the Constitution or its goal of representational equality.[16]

But plaintiffs' claim was not that the procedures employed in the 1990 census were constitutionally proscribed but that additional procedures were constitutionally mandated. A standard of consistency with constitutional goals and language is different from a standard of mandated actions. The possibility of alternative decisions being equally constitutional is suggested both in *Montana*, 503 U.S. at 463 ("The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course"), and *Franklin v. Massachusetts*, 112 S. Ct. at 2778 (finding Secretary's judgment to have been "consonant with, though not dictated by, the text and history of the Constitution"). As distinguished from congressional

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[15]*Cf. Franklin v. Massachusetts*, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment) (noting inability to change "home of record" designation after entering military service as implicating constitutional requirements of accuracy and decenniality).

[16]Because Congress retains the authority to alter the apportionment reported by the President, it can also correct census abuses as well as innocent inaccuracies. *See* 2 U.S.C. § 2a(b) (apportionment of Representatives shown on states' Certificates of Entitlement effective "in each Congress thereafter until the taking effect of a reapportionment under this section or *subsequent statute*" (emphasis added)).

apportionment,[17] decisions regarding the census are noteworthy not only because of the nearly limitless number of procedural choices available, but because many decisions would properly be regarded as consistent with constitutional language and the goal of representational equality, notwithstanding the likely superiority of alternative or additional procedures as giving more accurate counts.

Hiring 400,000 enumerators should produce a more accurate census than employing 300,000, yet either level would seem constitutionally permissible. Assigning more enumerators on a per capita basis to states with large numbers of non-citizens or linguistic minorities would appear constitutionally permissible, even though its necessary consequence would be to reduce the per capita assignment in other states. Ten attempts at non-response follow-up should yield more accurate counts than six attempts, which should yield more accurate counts than four attempts. Yet the Constitution would seem satisfied whether four, six or ten attempts are made. Because the census is used to allocate rights of political representation over the next ten years, a census taken on October 1 should be more accurate in terms of providing more current population totals than one taken on April 1. Yet the choice of an April 1 census data should also be constitutional. If a post-census sample of 377,000 people stratified among

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[17]In the case of apportionment, Art. I, § 2 requires that each state be apportioned at least one Representative and that there be no fewer than 30,000 inhabitants per Representative once each state has been apportioned one. Congress must also select an apportionment that is related to population. *Montana*, 503 U.S. at 463. Beyond this, it seems very likely that congressional apportionment is required to reflect rough proportionality to the states' populations--if a state with a population of 1,000,000 is apportioned two Representatives, a state with a population of 2,000,000 cannot be apportioned eight. It may be that because mathematical analysis has concluded that only five methods of apportionment lead to a workable solution of the fractional remainder problem, *see id.* at 451-52, the selection of one of these methods is required.

1,392 mutually exclusive demographic strata produces results whose bias and variability prevent improvement in the census's distributional accuracy, the Constitution does not mandate a sample of two million people next be taken.

Decisions regarding the best way of conducting the census necessarily "command[] far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. Review of census decisions should reflect the need for prompt determinations of validity or invalidity, so as to limit the impact of review on census finality. This counsels courts to avoid transforming review of census decisions into legislative determinations of the procedures best capable of producing the most accurate census practicable. In general, where challenged census procedures represent the adherence to, or reasonable modifications of, previous census practices and do not represent a retreat from attempts to obtain an accurate census,[18] they should be sustained. In general, unless their adoption would conflict with other constitutional principles, innovations to improve coverage should be sustained. Particularly where challenged census action consists of a decision *not* to adopt a specific methodological innovation, the decision should be upheld. It is not that decisions not to adopt specific census innovations are unreviewable, but that in nearly all cases they are constitutional. *Cf. Montana*, 503 U.S. at 458 (decision that a constitutional provision may not be judicially enforceable "is of course very different from determining that specific congressional action does not violate the Constitution"). If exceptions need to be recognized to this standard, they are not presented by a case in which the innovation being advanced represents a departure from a 200-year practice

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[18]Thus, in arguing that a constitutional entitlement to specific census innovations should not be recognized, Wisconsin is not suggesting that the wholesale abandonment of prior census procedures, unless replaced by new ones, would not be subject to constitutional constraints. This is not, however, what was being alleged here.

of actual enumeration, in which intense professional and scientific debate exists as to the feasibility of the innovation and its potential for introducing new errors into the count, and in which significant policy reasons, many of constitutional stature, militate against the procedure's adoption.

States, municipalities, citizen groups and individuals perceiving an advantage in a particular procedure or methodological innovation are free to petition Congress for its adoption.[19] Because all states are represented in Congress, states which would be adversely affected by a particular innovation are able to advance their interests or to offer alternative procedures. The selection of the many procedures which actually go into the taking of the census represents the outcome of an evolutionary process in which innovations are conceived of, debated, developed, tested, implemented, retained and abandoned in an attempt to achieve more accurate counts each decade. Once the methods of taking the census have been selected, each state has the incentive to encourage the greatest census response on the part of its residents within the established methodological framework.

B. The recognition of a constitutional right to the most accurate census practicable not only conflicts with the Constitution's grant of congressional authority but results in an untenable system of census governance. The recognition of these claims encourages states and municipalities to eschew Congress in favor of individual district court actions to compel those innovations perceived as conferring the greatest benefit in the count. This has the potential of producing different, if not inconsistent,

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[19]Congress did not enact any of the legislation introduced before and after the 1990 census to compel its statistical adjustment. *See* Congressional Research Service, *Decennial Census Coverage: The Adjustment Issue*, at 23-27 (Feb. 1, 1994), for summary of legislation introduced in the 100th through 103rd Congresses relating to census adjustment.

judgments as each court focuses on the particular innovation advanced by the plaintiffs before it. Unlike Congress, where all states are represented, adversely affected states are likely to be heard at all only if they submit to the jurisdiction of a court which would not otherwise have jurisdiction over them.

Claims to the adoption of specific census innovations inherently conflict with the need for finality and certainty in the decennial reallocation of representational rights, both among and within the states. This need is reflected in the strict statutory timetable established by Congress for taking and completing the census, for reporting its results to Congress and to the states and for translating the results into entitlements to representation in the national government.[20] Protracted litigation as the vehicle for deciding the best way of conducting the census threatens substantial disruption of state redistricting efforts. The effect of changing census numbers on states whose apportionments would change is plain. A state told that it has one less Representative than before cannot hold elections with its current districts. But even states whose apportionments do not change will witness an apparent change in district populations when census results are changed. Because Art. I, § 2 imposes a standard of precise mathematical equality in congressional redistricting, *Karcher v. Daggett*, 462 U.S. at 734, already-established

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[20]Under the current census statutes, April 1 is established as the decennial census date. 13 U.S.C. § 141(a). Under 13 U.S.C. § 141(b), the Secretary of Commerce is required to report the states' population totals to the President by December 31 of the census year. Under 2 U.S.C. § 2a(a), the President is to report the states' population totals and the new apportionment to Congress within the first week of its first session in the year following the census, with the apportionment determined using the method of equal proportions. The President's report establishes a state's entitlement to a particular number of Representatives. *Franklin v. Massachusetts*, 112 S. Ct. at 2773 (plurality opinion). Within fifteen days after the President's report, the Clerk of the House of Representatives is required to send to each state's governor a Certificate of Entitlement showing the state's new apportionment. 2 U.S.C. § 2a(b).

districts can be claimed to be unconstitutional. Either under Art. I, § 2 or state constitutional provisions,[21] states may either feel or be compelled to draw new congressional and legislative districts. Whether a state retains or redraws its districts, its choice could easily trigger litigation. At the same time, litigation which spans half the decade determining the best way of taking the census can ultimately provide at most a formal, rather than real, improvement in equality of representation. Correction of population totals as they existed on April 1, 1990, become increasingly less relevant to true equality as the decade progresses, which is the reason a new census is taken at the decade's end. There might be cases where the need for census finality must give way to superior constitutional commands, as where plainly unconstitutional action is not discovered until after Congress' election under the new census. A claim that specific methodological innovations are necessary to achieving census accuracy does not present such a case.

A judicially enforceable right to the most accurate census practicable invokes no clear standard of constitutionality. Article I, § 2 redistricting standards are not successfully engrafted onto census decisions merely by substituting the phrase "as accurate as is practicable" for "as equal as is practicable." The concept of practicability with respect to census accuracy is defined over the set of all possible census procedures which might be used in counting the population. Available choices range from decisions as broad as the level of census appropriations to decisions as specific as the actual assignment of enumerators, the script to be followed during non-response follow-up, or the length and format of census questionnaires. As previous examples regarding constitutionally permissible census procedures suggest,

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[21] *See e.g.*, Wis. Const. Art. IV, § 3 ("At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants").

whatever procedures are selected for taking the census, additional procedures can always be posited for improving census accuracy. Doubling the expenditure for targeted outreach should make the census more accurate. If a 400,000-person sample fails to improve accuracy, a post-census sample of a million can be posited which might. The examples also point to the fact that the choice of census procedures is an inherently legislative task, requiring the balancing of technical and policy trade-offs, often entailing resource allocation decisions. Increasing enumerator positions reduces resources available for other census programs or for non-census expenditures. Changing the date for taking the census or for reporting its results may improve accuracy, but at the cost of shortening the time for states to accomplish redistricting.

Even if the concept of census "practicability" had obvious boundaries, determining the effect of a specific census procedure's adoption on equality of representation at best involves complex and uncertain judgments for which "[n]either mathematical analysis nor constitutional interpretation provides a conclusive answer."[22] *Montana*, 503 U.S. at 463. A court might be able to select census procedures believed to offer the best chances of ensuring the greatest number of people being counted, although it is unlikely to have any greater abilities in this regard than Congress or the Executive. But the constitutional basis for asking courts to compel specific census innovations is not the desirability of counting the greatest number of people but the ability to distribute the population correctly among the states. That the selection of census procedures will have representational consequences is a truism. Where small changes in state populations can change the

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[22]New York's and New Jersey's errors in predicting higher populations under statistical estimation present a good example. Philadelphia, also a plaintiff, would not only lose population as a share of the national total under the PES (A.R. App. 10 (June 13, 1991), Table 3 (estimated undercount 0.8% below national estimates)) but would suffer reduced representation in Congress resulting from Pennsylvania's loss of a House seat.

apportionment of Congress, the abstract recognition of the relation between census errors and representational rights does not confer the ability to predict accurately the impact of census innovations on representational equality.

The Sixth and Seventh Circuit's decisions in *Tucker v. U.S. Dept. of Commerce* and *City of Detroit v. Franklin* [23] reflect a deep and well-founded judicial skepticism, not as to the need for review of census decisions which contravene constitutional text or principles, but as to the courts' ability to mandate the adoption of specific census innovations in the guise of enforcing the Constitution.[24] In *Tucker*, a

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[23]Three court of appeals' decisions from the 1980 census concerned claims to statistical adjustment. *See Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980) (upholding preliminary injunction requiring procedures to correct errors in New York's and New York City's count; evidence of census undercount of minority populations held to establish likelihood of success on the merits in light of Art. I, § 2 congressional redistricting standard in *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), requiring voting equality "as nearly as is practicable"); *Carey v. Klutznick*, 653 F.2d 732 (2d Cir. 1981) (reversing and remanding district court's subsequent judgment on the merits; district court's broad sanction order for government's refusal to produce confidential master address registers held to punish unrepresented states which would be adversely affected by adjustment of single state's population by preventing full and fair disclosure of facts and adjudication of the merits), *cert. denied*, 455 U.S. 999 (1982) (*see also Klutznick v. Carey*, 449 U.S. 1068 (1980) (staying portion of district court's judgment enjoining the reporting of census results to President on December 31, 1980)); *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981) (reversing judgment compelling development of methods to statistically adjust census to correct for minority undercounts; plaintiffs held to lack standing and claim held not ripe because alleged loss of representation from undercount would result from the Michigan Legislature's intervening decision not to adjust the census in redistricting, which had not yet occurred), *cert. denied*, 455 U.S. 939 (1982).

[24]The Second Circuit's discussion of *Tucker* was limited to noting the Seventh Circuit's recognition that in redistricting cases plaintiffs are not required to prove that districting inequalities represent a deliberate effort to dilute an affected group's voting power (Pet. App. 36, citing *Tucker*, 958 F.2d at 1414). The court of appeals' decision did not discuss *City of Detroit*.

group of Illinois plaintiffs alleged that the existence of a differential undercount in the 1990 census would "cause[] them to lose representation in the House of Representatives and a fair share of federal and state funds allocated on the basis of the census figures." *Id.* at 1412. The plaintiffs' suit sought to compel "an appropriate statistical adjustment for the undercount," *ibid.*, as part of the decennial census. The district court had dismissed the claim as presenting a non-justiciable political question. *Tucker v. U.S. Dept. of Commerce*, 135 F.R.D. 175 (N.D. Ill. 1991). On appeal, the Seventh Circuit ruled that the claim was not justiciable because the plaintiffs lacked standing in the sense of having litigable rights. *Tucker*, 958 F.2d 1415-17.

Decided a few months before *Franklin v. Massachusetts*, *Tucker* was predictive of the standard of review of census decisions subsequently established by this Court. The Seventh Circuit understood the plaintiffs' claim to be that without a statistical adjustment they would lose congressional representation.[25] While stating that the case was not a reapportionment case, *Tucker*, 958 F.2d at 1415, the court of appeals held that the claim was not barred under the political questions doctrine, stating that "the political sensitivities that might have been thought to bring the apportionment cases within the scope of the political questions doctrine, but did not, are not greater here." *Ibid.* The court also recognized the judiciary's ability to decide census questions where established constitutional principles provide the grounds for the decision, as in a case "concern[ed] with discrimination rather than innocent inaccuracy" or, with greater reservations, with respect to a challenge to "some categorical judgment of inclusion or exclusion argued to be

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[25]*Tucker*, 958 F.2d at 1415-16 (noting that litigation had not been allowed to proceed to the point where the plaintiffs would be required to specify the adjustment sought, preventing a determination that they had nothing to gain from winning the case).

in violation of history, logic, and common sense." *Id.* at 1418 (citing *Com. of Mass. v. Mosbacher*, 785 F. Supp. 230 (D. Mass. 1992) (three-judge court), *rev'd sub nom., Franklin v. Massachusetts*, *supra*. In contrast to these types of claims, the Seventh Circuit held that merely by directing congressional apportionment in accordance with the decennial census, "Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." *Tucker*, 958 F.2d at 1418. Unable to find in the apportionment clause, the census statutes or the Administrative Procedure Act guidelines for taking an accurate decennial census, the court stated:

> So nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in a case like this, . . . --that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness.

Id. at 1417-18 (citations omitted). Contrasting the judicially administrable standard of voting equality in redistricting cases, the court characterized the plaintiffs' claim as one not asking a court to decree equality but "to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount." *Id.* at 1418.

In *City of Detroit*, the Sixth Circuit followed the Seventh Circuit's reasoning to uphold summary judgment dismissing a claim seeking to compel statistical adjustment of the 1990 census or to compel a recount of Detroit's residents. 4 F.3d at 1375-78. Concluding that states could use statistically adjusted census data in congressional redistricting, the court also affirmed the dismissal of a claim for lack of standing that unadjusted census data

would result in inequalities of representation in state redistricting. *Id.* at 1373-74.

The Sixth and Seventh Circuit's negative assessment of the courts' ability to decree equality by taking sides in disputes regarding the Census Bureau's statistical methodology resonates in the Constitution's positive grant of census authority. The issue raised by plaintiffs' claim is not whether a given census innovation is permissible, or even desirable, but whether the Constitution creates an entitlement to its adoption. The goal of equality is not demeaned, but respected, by recognizing the limits of the courts' ability to perform the inherently legislative function of determining how best to take the census. The existence of an unbounded set of procedures having the potential for improving census accuracy, the complex policy and technical calculus involved in the selection of census procedures, and the still greater complexity of determining the relation between census procedures and their impact on equality of representation make the decision whether to employ specific methodological innovations one for Congress, as the Constitution directs.

II. BY MISAPPREHENDING THE RELATION BETWEEN CENSUS ACCURACY AND EQUALITY OF REPRESENTATION, THE COURT OF APPEALS ERRED IN HOLDING THAT THE ADJUSTMENT DECISION WAS SUBJECT TO HEIGHTENED EQUAL PROTECTION SCRUTINY.

A. In concluding that Secretary Mosbacher had not made the required effort to achieve equality as nearly as practicable, the court of appeals referred to "Congress's expressed intent to encourage such use [of statistics]" (Pet. App. 38), an apparent reference to the court's earlier

holding that 13 U.S.C. § 195[26] does not preclude the use of sampling in the taking of the reapportionment census. The court held to the contrary that the statute's legislative history revealed "that a statistical adjustment to the initial enumeration is not barred by the Census Act and indeed was meant to be encouraged" (Pet. App. 25).

The court incorrectly interpreted § 195. When enacted in 1957, § 195 permitted the use of sampling "[e]xcept for the determination of population for apportionment purposes."[27] The current statutory language reflects its 1976 amendment (P.L. 94-521, 90 Stat. 2464) to require, rather than simply permit, sampling where feasible. The same law amended 13 U.S.C. § 141(a) to authorize the Secretary of Commerce to determine the "form and content" of "the decennial census of the population . . . including the use of sampling procedures and special surveys." The court of appeals correctly viewed the legislative history of the amendments to §§ 141(a) and 195 as revealing a congressional intent to encourage the use of sampling. *See* Pet. App. 24-25. However, the same legislative history, like the express language of § 195 both before and after amendment, specifically excepted the use of sampling for apportionment

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[26]"Except for the determination of population for purposes of apportionment of Representatives among the States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. § 195.

[27]As originally enacted, 13 U.S.C. § 195 provided: "Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." P.L. 85-207, § 14, 71 Stat. 484.

purposes.[28] The term "census of the population," as used in § 141(a) is defined in § 141(g) to mean a "census of population, housing, and matters relating to population and housing." No conflict exists between § 195's prohibition of sampling for purposes of obtaining the population used in apportionment and § 141(a)'s and § 195's encouragement of sampling for other purposes. When determining the apportionment census, the Secretary is not authorized to use sampling. For other census purposes--such as determining the portion of a state's population living in owner-occupied housing--the Secretary is encouraged to use sampling, where feasible.[29]

B. The court of appeals' greater error lay in concluding that the enumeration census denied representation on the basis of race or ethnicity and that the Secretary had failed to make the required good faith effort to achieve equality of representation as nearly as practicable. Based on these conclusions, the court incorrectly held that the adjustment decision was subject

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[28]The court of appeals quoted the language of S. Rep. No. 1256, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5468, which states:

> Section 10 amends section 195 of title 13, U.S.C., to require that the Secretary of Commerce authorize the use of sampling procedures in carrying out the provisions of this title whenever he deems it feasible, except in the apportionment of the U.S. House of Representatives. This differs from present language which grants the Secretary discretion to use sampling when it is considered appropriate. The section as amended strengthens congressional intent that, whenever possible, sampling shall be used.

The court emphasized the last sentence (Pet. App. 25).

[29]Thus, the *in pari materia* construction of §§ 195 and 141 as permitting sampling in the apportionment census in *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980), and followed by the district court here (Pet. App. 110 n.7) is incorrect.

to heightened scrutiny under Art. I, § 2 congressional redistricting standards and under equal protection standards governing racial classifications.

The ability to engraft Art. I, § 2 redistricting standards onto census decisions is problematic. In the case of intrastate congressional districting, "Article I, § 2 . . . 'permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.'" *Karcher v. Daggett*, 462 U.S. at 730 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). The ability to put forward a redistricting plan, either considered by the Legislature or developed by the plaintiff, which achieves smaller population deviations than the state plan establishes a state's failure to make a good faith effort to achieve equality of representation as nearly as practicable.[30] The concept of good faith reflects objective feasibility rather than an impressionistic assessment of subjective purpose.

In contrast to state redistricting standards, for the 1990 census no rigid formula existed for determining whether the estimated population totals were better than the original census in the constitutionally relevant sense of improving equality of representation in Congress. Instead, the Secretary was presented with a myriad of complex statistical arguments, subject to intense dispute among statisticians and demographers, concerning the relative distributional accuracy of two sets of numbers, each known not to represent "true" population totals.

The concerns identified by the court of appeals as underlying the decision not to adjust read not as an indictment of the decision but as proof of the Secretary's reasoned evaluation of an exceedingly complex and constitutionally perilous issue. As summarized by the

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[30]Thus, in *Karcher v. Daggett*, the plaintiffs were able to sustain their threshold burden by pointing to several plans considered, but not adopted, by the New Jersey Legislature which resulted in smaller population deviations than the 0.6984% maximum deviation under the challenged plan. 462 U.S. at 738.

court, the Secretary was concerned that adjustment might result in an incorrect apportionment of Congress (Pet. App. 19, 38). Half of his advisors believed that accuracy at the state and local levels would not be improved (*id.* at 19). Uncertainty as to the methods of adjustment and their underlying assumptions created the danger that an adjustment would be made on the basis of research conclusions that might well be reversed in the next several months (*ibid.*). Because the effects of different adjustment methods could be known in advance, the adjustment process might become subject to political manipulation (*id.* at 19, 38). The Secretary also found that adjustment would not result in greater distributive accuracy and that statistical estimation would undermine future census participation by removing the incentive for states to cooperate in the census (*id.* at 38).

Given its interpretation of the district court's decision as having "implicitly found" that the census failed to achieve equality of representation and its characterization of the Secretary's adherence to the census as denying representation on the basis of race or ethnicity (*id.* at 34), the court of appeals' decision suggests that the court viewed the adjusted numbers as clearly superior to the enumeration census in terms of achieving equality of representation either with respect to the apportionment of Congress or in state redistricting. Yet other parts of the decision contradict this interpretation. In summarizing the adjustment decision, the court stated that the Secretary had "conced[ed] that the adjustments would likely bring greater accuracy in the count at the national level" but that he had expressed a principal concern "that adjustment might not improve distribution of Representatives among the states" (*id.* at 19). The court returned to the effect of adjustment on congressional apportionment in summarizing its reasons for finding that the Secretary had not made a good faith effort to achieve equality of representation. The court pointed to the Secretary's statement "that an adjustment would not be made because it would not result in *greater* distributive accuracy," as

revealing that "he would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate" (*id.* at 38 (emphasis in the original)). The court did not state that the evidence established that the adjusted counts resulted in the correct apportionment of Congress or that adherence to the original counts caused an incorrect apportionment. The court of appeals did not make any finding with respect to the adjusted numbers' impact on equality of representation in intrastate districting and did not discuss the plaintiffs' ability to achieve intrastate equality by using the adjusted data ordered released more than a year before.

The court emphasized the perceived numeric accuracy of the adjusted numbers, particularly at the national level, as a key fact demonstrating the Secretary's lack of good faith. The court's emphasis on numeric accuracy not only highlights its misconception of the relation between census accuracy and equality of representation but underscores the Secretary's good faith in *not* focusing on this aspect of census accuracy. A census which achieves "true" numeric accuracy in the count of the national population has no inherent superiority over one which does not. What makes one set of numbers constitutionally superior is its ability to distribute correctly a given national population among the states. If this occurs, it is constitutionally irrelevant whether the national count is half or double its "true" level or somewhere in between. The same percentage distribution of the national population among the states will result in the same apportionment, regardless of the level of the national population. Unless they result in the correct distribution of the national population, improvements in the numeric accuracy of state population totals are similarly uninformative on the issue of representational equality. Adding 30,000 to the population total of a state whose "true" undercount was 50,000 would improve the

numeric accuracy of the state's count, as would adding 120,000 to the population of a state whose "true" undercount was 80,000. But if the result would be to cause the first state to lose a seat in Congress, to which it would be entitled under the states' "true" populations, equality of representation does not improve, but deteriorate, by increasing numeric accuracy.[31]

The Art. I, § 2 redistricting standard relied on by the court of appeals places the burden on parties challenging a state's plan to establish that population differences could have been reduced or eliminated by a good-faith effort to draw equal population districts (Pet. App. 36-37, citing *Karcher v. Daggett*, 462 U.S. at 730-31). In redistricting cases, this threshold burden is met by a plaintiff's putting forward a plan which achieves smaller population deviations than those under the state plan. The failure to come forward with such a plan defeats a plaintiff's claim. *See Karcher v. Daggett*, 462 U.S. at 731 ("if [redistricting plaintiffs] fail to show that the differences could have been avoided the apportionment scheme must be upheld"). If standards for congressional redistricting are to be applied to the census, the ability to point to a different apportionment using a different set of census totals does not answer whether the new apportionment improves equality of representation. *Cf. Franklin v. Massachusetts*, 112 S. Ct. at 2778 (although different apportionment would have resulted from exclusion of overseas personnel from apportionment census, "certainly appellees have not demonstrated that eliminating overseas employees entirely from the state counts will make representation in Congress more equal"). Even accepting the court of appeals' characterization of the PES apportionment as being "just as accurate" as the census apportionment, "just as accurate" does not mean a better apportionment, only a different apportionment. The

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[31] An example of increased numeric accuracy causing representational equality to worsen is contained in the Secretary's adjustment decision (Pet. App. 183).

district court did not "implicitly" find that the census failed to achieve equality of representation as nearly as practicable. Rather the district court expressly found that plaintiffs failed to demonstrate at the national, state or local level, and for any reasonable definition of accuracy, that the adjusted numbers were superior to the census (Pet. App. 78).

C. The court of appeals' concern regarding the persistence of the differential undercount of minorities was understandable. But the existence of the differential undercount did not warrant the conclusion either that the Secretary had failed to achieve equality of representation as nearly as practicable or that the census denied representation on the basis of race or ethnicity.

To the extent the Second Circuit conceived of a right to be counted in the census, independent of the impact of census inaccuracies on equality of representation, its analysis of the census's differential count of minorities was not consistent with established Equal Protection principles. An equal protection violation based upon racial discrimination requires proof of discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 239-245 (1976). Here, plaintiffs did not allege any discriminatory purpose. Neither the adjustment decision nor the procedures selected for taking the enumeration census give the least hint of discriminatory purpose. The 1990 census was noteworthy for its concerted and comprehensive efforts to count minority residents.

The court of appeals' decision did not focus on the differential undercount's impact on non-representational interests, but on its effect on the allocation of representational rights. In this regard, the court of appeals did not err in concluding that a denial of representation on the basis of race or ethnicity does not require proof of discriminatory purpose. *Accord Tucker*, 958 F.2d at 1414 (redistricting cases do not place on plaintiffs any burden of proving that a malapportionment represents a deliberate effort to dilute some group's voting

power). If anything, positing a differential undercount as the reason for a loss of representation offers to prove more than is necessary. If the numbers used to apportion Congress result in an unintended but nevertheless avoidable malapportionment, then from a constitutional standpoint it does not matter why this has occurred but *that* it has occurred. *See ibid.* (in redistricting cases, "[i]t is enough that the state's electoral districts *are* malapportioned.")

Instead, the court of appeals' error lay in its assumption that the existence of the undercount differential meant that representation had been denied to begin with. Representatives in Congress are apportioned to states, not racial or ethnic groups. Every state has racial and ethnic minorities, and the effect of changing a state's apportionment is the same for all its residents, regardless of race or ethnicity. Taking a House seat from Wisconsin reduces the representation of black voters in Milwaukee to the same extent as it reduces the representation of white voters in Green Bay, Menominee voters in Keshena and Hmong voters in Eau Claire. Whether a particular ethnic or racial group's representational rights can be improved through a different apportionment of Congress is the same question as whether the apportionment can be improved. Unless adjustment will improve equality of representation in Congress, all that is accomplished by shifting seats in Congress from states with relatively small minority populations to states with relatively large minority populations is an arbitrary reallocation of rights of political representation.

The differential undercount provides a highly stylized reason for why the census *might* result in inequality of representation in Congress. It does not answer the question of *whether* this has occurred or, if it has occurred, how to correct it. The complex texture of the PES estimates involved much more than the measurement

of racial and ethnic undercount differentials nationally.[32] More importantly, there was no finding that the census resulted in inequality in the apportionment of Congress or that the adjusted numbers would improve equality. Accordingly, the court of appeals erred in holding that the adjustment decision was subject to heightened equal protection scrutiny.

III. THE SECRETARY'S DECISION WAS CONSTITUTIONAL.

A. Plaintiffs did not contend that the decision to adhere to the enumeration census contravened constitutional text or history. To the contrary, over and above the broader conflict between claims of constitutional entitlement to specific census innovations and Congress' constitutional and historically exercised authority to direct the manner of taking the census, aspects of the PES conflicted with constitutional language and principles.

Even if the Secretary's decision regarding the use of the adjusted numbers had not led to further litigation, the PES numbers would have been untimely. The actual post-census survey was not begun until nearly three months after the April 1 census date. Because of the process's complexity, initial results of the PES were not reported until April 1991 and revised estimates were not reported until June 1991, which continued to contain errors not corrected until the following spring. The evaluation of the estimates was not sufficiently completed to permit a decision until July 15, 1991. The adjustment decision,

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[32]If all that mattered to the states' census coverage rates was the proportion of their populations consisting of minority racial and ethnic groups, the PES would have looked much different than it did. States such as Rhode Island, Massachusetts, Pennsylvania and Wisconsin would not have had estimated undercount rates below the average for non-Hispanic whites nationally, and states like New Jersey, Michigan and Illinois would not have undercount rates roughly half those estimated for Montana, Wyoming and Idaho. *See* A.R. App. 10 (June 13, 1991, Release), Table 5.

therefore, was not made until more than six months after the President's report of the states' apportionments to Congress, 2 U.S.C. § 2a, and more than three months after the time established for the provision of P.L. 94-171 data for use in state redistricting. 13 U.S.C. § 141(c). The substitution of the adjusted numbers for the enumeration census would have required states to begin again the politically complex task of redistricting or--what would have been still more disruptive--to become embroiled in litigation as to the numbers to be used in redistricting. Efforts to achieve greater census accuracy at the cost of impairing the states' ability to establish new districts and hold elections present no clear improvement in representational equality.

Adjusting the census would have represented the first time in the nation's history that the states' apportionment populations would have been based on counts in other states (Pet. App. 251-52). Statistically, this fact implicates the problem of assuming homogeneity of the sample strata--the assumption, for example, that African-American residents of Madison had the same chance of being counted in the census as their post-stratum counterparts living in Peoria. Yet Wisconsin showed a significant increase in its African-American population between 1980 and 1990--indicating relatively recent immigration into the state--not witnessed in other states in the East North Central census region.[33] Constitutionally, the reliance on sample observations in other states to

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[33]Wisconsin's African-American population grew by 33.5% during the decade of the 1980's, compared to less than a 4% overall increase in the state's population--one of the reasons the state was able to retain a ninth House seat. During the same period, growth rates in African-American populations in the other East North Central states ranged from 1.2% in Illinois to 7.9% in Michigan. Source: U.S. Department of Commerce Bureau of the Census, *1980 Census of Population: General Social and Economic Characteristics*, United States Summary at 1-277, Table 232 (1983); U.S. Department of Commerce Bureau of the Census, *1990 Census of Population: Summary Population and Housing Characteristics*, United States Summary at 59, Table 2 (1992).

estimate a state's population conflicts with the requirement that representation in Congress be based on the states' populations, "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2.

The use of statistical estimation techniques to "correct" the results of the enumeration census also meant that state and local officials would no longer have an incentive to encourage residents to take part in the census. A significant problem in the 1990 census was a lower than anticipated response rate during the initial mail-out/mail-back phase (Pet. App. 15, 327-28). Wisconsin actively encouraged its residents' participation in the census, achieving the highest voluntary response rate in the nation (J.A. 95-101; A.R. App. 6 at 40). To reward these efforts and this accomplishment by taking away the state's ninth House seat could not send a clearer message regarding the value of performing this single duty of national residence. Undermining the ability to achieve accuracy in future censuses impairs, and therefore conflicts with, the goal of equality of representation.

More broadly, the use of statistical estimation acquiesces in broader trends of citizen non-involvement in the processes of self-government, particularly among population groups whose historic underinclusion in the census has corresponded to a much greater, and much more serious, underinclusion in the political process. The PES penalized states, like Wisconsin, whose high rate of voluntary census participation corresponded to high rates of voter participation. This result is contrary to the constitutional judgment reflected in Section 2 of the Fourteenth Amendment that equality of representation is furthered by apportioning representation in the national government in proportion to the degree that states have effectively extended the right to vote.[34] Similarly,

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[34]Wisconsin imposes a ten day residence requirement on voting and does not require voter registration. *See* Wis. Stat. § 6.55 (eligible voters permitted to vote by producing evidence of current address on day of election). According to Census Bureau estimates, Wisconsin's level of

statistical estimation undermines the perceived legitimacy of the allocation of representational rights at both the state and national level. *Cf. Montana*, 503 U.S. at 465-66 (noting states' and nation's acceptance for half a century of congressional apportionments based on method of equal proportions as factor supporting method's constitutionality). Procedures selected for taking the enumeration census--expanded targeted outreach programs, increases in enumerators assigned to canvass minority neighborhoods, simplified census forms--will have representational consequences, but these are very difficult to know in advance. *See* Pet. App. 228 ("small changes in the census enumeration can move seats in the House . . . but no individual involved in the enumeration process can predict how"). In contrast, the extreme sensitivity of the statistical estimates to modeling assumptions and methodological choices opens the process to political manipulation. Beyond this, no state would view as legitimate a loss of representation from that already established by the President which may represent nothing more than random sampling error, which results from a statistical process that introduces as many sources of error as it is attempting to "correct," which is based on a sample that includes only 141 blocks from within the state and which estimates the state's population using sample observations primarily from other states.

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voter participation is significantly higher than national averages, both for minority and non-minority voters. *See* U.S. Department of Commerce Bureau of the Census, *Current Population Reports, P 20-440*, "Voting and Registration in the Election of November 1988" at 36-40 (1989); U.S. Department of Commerce Bureau of the Census, *Current Population Reports, P 20-466*, "Voting and Registration in the Election of November 1992" at 23-30 (1993). *See also* The Council of State Governments, *The Book of States 1994-95* at 226, Table 5.9 (Voter Turnout For Presidential Elections: 1984, 1988 and 1992) (1994). The provision of Section 2 of the Fourteenth Amendment for a reduction in the states' apportionment populations in the proportion to the percentage of male citizens whose right to vote "is denied . . . or in any way abridged" has been held a political question. *Sharrow v. Brown*, 447 F.2d 94 (2d Cir. 1971), *cert. denied*, 405 U.S. 968 (1972).

B. At the very least, the Secretary's decision was consonant with the goal of equal representation.

The issue is framed by the availability of two sets of census numbers, each different from the other down to the block level. The *ex post* availability of two census results resolves plaintiffs' claim that a failure to estimate the census would result in representational inequality in the creation of their own congressional and legislative districts. "The simple answer . . . is that [plaintiffs do] not have to utilize the census figures in apportioning [their] legislative districts . . . ." *Cuomo v. Baldridge*, 674 F. Supp. at 1105 n.31.[35] The district court ordered the release of adjusted block-level data to the plaintiffs two and a half years ago (Pet. App. 91-95). To the extent plaintiffs have not used the adjusted data to draw new districts, their commitment to principles of equality, like their belief in the superior accuracy of the adjusted counts, rings hollow.[36] To the extent the plaintiffs have redrawn

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[35]*Accord, Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992) (if state knows that census data are under-representative, it "can, and should, utilize noncensus data in addition to the official count in [the] redistricting process"); *Assembly of State of Cal. v. U.S. Dept. of Commerce*, 968 F.2d 916, 918 n.1 (9th Cir. 1992); *City of Detroit*, 4 F.3d at 1373-74; *Young v. Klutznick*, 652 F.2d at 624-26. *See also Kirkpatrick v. Preisler*, 394 U.S. at 535 (suggesting approval of population inequalities in congressional districts to reflect anticipated population shifts if population trends are thoroughly documented and applied in a systematic, and not *ad hoc*, manner).

[36]While it is difficult to have confidence in the interpretation of other states' redistricting statutes and case law, Wisconsin is not aware of any plaintiff state whose legislative or congressional districts were established after the district court ordered the release of the block-level adjusted data. *See e.g.*, N.Y. State L. (McKinney 1995) § 111 (congressional districts, effective June 11, 1992), § 121 (legislative districts, effective May 4, 1992); Ariz. Rev. Stat. Ann. (1994) § 16-1102 (legislative districts, effective June 16, 1992); *Arizonans For Fair Representation v. Symington*, 828 F. Supp. 684 (D. Ariz. 1992) (three-judge court) (congressional districts), *aff'd mem. sub nom., Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 113 S. Ct. 1573 (1993).

their districts, an order compelling a mid-decade change in the decennial census is unnecessary. New York City does not have an interest in compelling Oklahoma's or Indiana's use of the adjusted numbers.[37]

The *ex post* availability of two sets of census results also changes the evaluation of plaintiffs' claim to a specific census innovation. In their complaint, plaintiffs presented a plausible theory for why anticipated errors in the census might result in reduced representation. The claim went beyond a critique of census accuracy to offering a specific, previously untried, method for "correcting" the results of the decennial census. As it turned out, neither claim was correct. While a differential undercount was confirmed, the PES did not change the congressional apportionment of five of the plaintiff states, and both New York and New Jersey would have lost population as a share of the national total under the adjusted numbers. That two of the plaintiff states would have each gained a seat in the House of Representatives under the estimated counts merely begged the question of whether they were entitled to additional representation--and whether Wisconsin and Pennsylvania deserved to lose representation--under the states' "true" populations.

In *Franklin v. Massachusetts*, the challenged census decision was the inclusion of overseas populations in the states' apportionment totals based on "home of record" data. The allocation of overseas personnel to the states had occurred two other times, in 1900 and 1970. 112 S. Ct. at 2771. "Home of record" data were known to exhibit a

---

[37]In addition, the provision of census data used in state redistricting is statutory. *See* 13 U.S.C. § 141(c). To the extent this statutory function makes the adjustment decision reviewable under the Administrative Procedure Act's arbitrary and capricious standard, *see Franklin v. Massachusetts*, 112 S. Ct. at 2782 (Stevens, J., concurring in part and concurring in the judgment), the plaintiffs did not challenge, and the court of appeals did not disturb, the district court's findings that the Secretary's decision satisfied this standard.

high "error rate" and possibly little correlation with an employee's true feelings of state affiliation. *Id.* at 2786 (Stevens, J., concurring in part and concurring in the judgment). Indeed, a man or woman who designated a home of record upon entering military service could not change it later. *Id.* at 2786 n.22. Nevertheless, the Court concluded that the Secretary's decision to include this very imprecise measure of the states' overseas populations "does not hamper the underlying constitutional goal of equal representation, but assuming the employees temporarily stationed abroad have indeed retained their ties to their home States, actually promotes equality." *Id.* at 2778 (opinion of O'Connor, J.). The members of the Court who viewed the decision as reviewable under the APA's arbitrary and capricious standard found it to have been neither. *Id.* at 2786-87 (Stevens, J., concurring in part and concurring in the judgment).

Here, the Secretary's decision rested on a comprehensive evaluation of highly technical issues of statistical interpretation. Given that the distributional accuracy of the PES determined its impact on equality, it was consistent with the goal of equality of representation for the Secretary to weigh the many sources of error that impaired the distributional quality of the estimates. For example, it was consistent with the goal of representational equality for the Secretary to question the validity of the PES's central assumption of sample homogeneity, where substantial evidence contradicted the assumption. It was also consistent with the goal of equal representation for the Secretary to be concerned that the estimates had been derived under severe time constraints, employing untested modeling assumptions. It was consistent to consider the estimate's instability with respect to congressional apportionment.

Again, a standard of consistency is different from one of mandated actions. Where statisticians intensely disagree as to whether a sample has been constructed, taken and statistically manipulated in a manner that yields a "better" distribution of the population, a decision

regarding the choice of census totals necessarily "commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. Stated otherwise, a state's claim to an additional House seat which is premised on a modeling decision to exclude 28 out 1,392 variance outliers during variance "pre-smoothing" does not invoke "a substantive standard of commanding constitutional significance." *Id.* at 463. Even those tending to favor adjustment, which included the Census Bureau's director and the district judge himself, found the Secretary's technical and policy evaluation reasonable. If it was reasonable to conclude that the adjusted numbers would not improve, and possibly worsen, the distributional accuracy of the census, it was consonant with the goal of equal representation not to substitute the adjusted numbers for those officially reported. The Secretary acted constitutionally.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court affirmed.

Respectfully submitted,

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(7)

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Nos. 94-1614, 94-1631, 94-1985 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN,

Petitioner,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

STATE OF OKLAHOMA,

Petitioner,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

UNITED STATES DEPT. OF COMMERCE, *et al.*,

Petitioners,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONER STATE OF OKLAHOMA'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the decision of the Secretary of Commerce not to statistically adjust the 1990 census is consistent with the mandate of Article I, § 2, cl. 3 of the United States Constitution that "[t]he actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct."

2. Whether the opinion of the Court of Appeals is inconsistent with *United States Dept. of Commerce v. Montana*, 503 U.S. 442 (1992), and *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), and in conflict with *Tucker v. United States Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S.Ct. 407 (1992), and *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S.Ct. 1217 (1994).

3. Whether the Court of Appeals erred in imposing upon the Secretary of Commerce the heightened burden of showing that the decision furthers a governmental objective that is legitimate and is essential for the achievement of that objective.

PARTIES TO THE CONSOLIDATED PROCEEDINGS

Petitioners, defendants below, are: United States Department of Commerce; Ronald H. Brown, Esq., As Secretary of the United States Department of Commerce; Everett Ehrlich, As Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Harry Scarr, As Acting Director of Bureau of Census; William J. Clinton, As President of the United States; Dan Glickman, As Secretary of Agriculture; Donna E. Shalala, As Secretary of Health and Human Services; Henry Cisneros, As Secretary of Housing and Urban Development; Robert B. Reich, As Secretary of Labor; Federico Peña, As Secretary of Transportation; Richard W. Riley, As Secretary of Education.

Petitioners, intervenor-defendants below, are: State of Oklahoma; State of Wisconsin.

Respondents, plaintiffs below, are: City of New York; State of New York; City of Los Angeles; City of Chicago; City of Houston; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; Jerry Alan Wood; Carolyn Sue Lopez; City of Atlanta, Georgia; Maynard Jackson, Individually, and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis

Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernadino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona; Council of Great City Schools.

Additional respondent, defendant below, is: Donnald K. Anderson, As Clerk of the United States House of Representatives.

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No. 94-1614, No. 94-1631, No. 94-1985 (Consolidated)

IN THE
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER STATE OF OKLAHOMA'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit ("Second Circuit") is reported at 34 F.3d 1114 (2nd Cir. 1994). Pet. App. 1.[1] The opinions of the United States District Court for the Eastern District of New York are reported at 822 F. Supp. 906 (E.D.N.Y. 1993), 739 F. Supp. 761 (E.D.N.Y. 1990), and 713 F. Supp. 48 (E.D.N.Y. 1989). Pet. App. 46, 104 and 130, respectively. The decision of the Secretary of Commerce is published at 56 Fed.Reg. 33582 (July 22, 1991). Pet. App. 146.

JURISDICTION

This case is before the Court by writ of certiorari granted September 27, 1995, to review the judgment of the United States Court of Appeals for the Second Circuit. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2, clauses 1 and 3, and Section 8, clause 18, of Article I of the United States Constitution; Sections 2 and 5 of the Fourteenth Amendment; 2 U.S.C. § 2a; and 13 U.S.C. §§ 141(a) and (b) and 195 are reproduced at App., *infra* 1a-6a.

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[1]References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 94-1631.

STATEMENT OF THE CASE

On November 3, 1988, the City and State of New York, the State of California, and several other cities, public interest groups and individuals brought this suit to compel the Department of Commerce and the Bureau of the Census to require a statistical adjustment of the 1990 decennial census count in order to reduce the anticipated undercount of the population.

Pursuant to a stipulation in the litigation, the Secretary of Commerce (the "Secretary") agreed to consider the question of whether the census headcount should be statistically adjusted.[2] Pursuant to the court-approved stipulation, the Secretary published a set of Guidelines for evaluating the adjustment question. One of those, Guideline Five, required the Secretary to decide whether any adjustment of the 1990 census would violate the United States Constitution or federal statutes. While he acknowledged unsettled judicial opinion as to whether adjustment violates 13 U.S.C. § 195, the Secretary stated in the commentary which accompanied his final decision: "the majority of courts considering the issue have ruled that section 195 permits an adjustment if the adjustment method makes the census more accurate [citations omitted]." 56 Fed. Reg. 33582, 33606, Pet. App. 254, 257.

The Secretary concluded that whether a chosen method of adjustment would violate the Constitution and federal statutes depends upon whether accuracy of the census is improved. Because he found other compelling reasons not to adjust, "legal considerations did not provide a basis for [his] decision." 56 Fed. Reg. at 33606, Pet. App. 258.

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[2] Oklahoma was not a party to the stipulation.

In 1991, the Secretary decided not to substitute adjusted numbers for those numbers reported by President Bush for apportionment of Congress and which were then used by the States, including Oklahoma, in redistricting. The Secretary's decision was consistent with two hundred years of adherence to a census based upon actual enumeration.

On April 13, 1993, the Secretary's decision not to adjust the census enumeration was upheld by the district court on the basis of the administrative record and the additional evidence presented at a lengthy trial. *See City of New York v. United States Dept. of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993). The district court, applying an "arbitrary and capricious" standard under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), determined that the Secretary's decision was reasonable.

On August 8, 1994, a divided panel of the Second Circuit reversed and remanded to determine whether the decision not to adjust was necessary to the achievement of a legitimate governmental purpose. *City of New York v. United States Dept. of Commerce*, 34 F.3d 1114 (2nd Cir. 1994). The Second Circuit concluded that § 195's prohibition against census adjustment for apportionment purposes, when read with § 141, actually encourages adjustment. *Id.* at 1125. The court also found that an adjusted census would be more accurate for "most purposes" and thus the Secretary's rejection of adjustment should be subject to heightened scrutiny. *Id.* at 1131. The late Judge Timbers dissented from the opinion. *Id.* at 1131-1132. He recognized that the majority's decision conflicted with two other circuit decisions, *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S.Ct. 1217 (1994), and *Tucker v. United States Dept. of Commerce*, 958 F.2d

1411 (7th Cir.), cert. denied, 113 S.Ct. 407 (1992), which had earlier upheld the Secretary's decision to not adjust the census.

SUMMARY OF ARGUMENT

The Census clause of the Constitution states that the decennial census shall be taken "in such Manner as [Congress] shall by Law direct." Congress exercised this power and enacted the Census Act which directs the manner in which the census is taken. Congress allows statistical sampling to be utilized for some census purposes but it expressly prohibits the use of sampling for the count used in the apportionment of Representatives. Thus, although the Secretary did not base his adjustment decision on the express prohibition of § 195, this legislative directive bars statistical adjustment until such time as Congress determines otherwise.

The decision of the Secretary of Commerce not to adjust the 1990 census complies with Congress' directive. It is consistent with the clear language of the statute, with its legislative history, the Constitution, and with the two hundred year tradition of following a method of actual enumeration.

Congress' decision not to adjust commands deference from the judiciary. The business of census taking is clearly committed to Congress, not the courts. Congress has the power to enact any legislation "necessary and proper" to carry out its duties. Congress has done so and its policy choice must be respected. If the standard of "actual enumeration" is ever to be definitionally and fundamentally changed, it must occur through Congress and not through any other branch of government. Judicial review must

accord great deference to the broad mandate given to Congress and the two hundred year history of conducting a census based upon an actual count of the people. The sole inquiry is whether the decision not to make a statistical adjustment to the actual enumeration is consistent with the text and authorization of the Constitution.

The constitutional role of the census is to resolve the struggle for political power -- not create a method for seizing political power. If post-enumeration adjustments can be made to the actual headcount, then the door has been opened for adjustments motivated by partisan interest.

Congress' prohibition against census adjustment also guards against politicizing the constitutional role of the census and furthers political stability at both the national and state levels. The census is the key to the reorganization of the legislative branch. The census must be available within the timetable imposed by law in order for the legislature to determine its own composition and continue the business of government without a delay or a break. If census adjustment and the selection of a formula become the subject of litigation, then timing is lost and the process falters.

Neither the Constitution nor the statutes address adjustment formulas. There are no legal guidelines which a court could apply to census methodology to determine which formula is the "best" or the one required by law. The concept of voter equality also fails to give guidance. The goal of equal representation does not tell a court how to determine what census methodology.

The Second Circuit's ruling also conflicts with the decisions of the Sixth and Seventh Circuits, *City of Detroit*, 4 F.3d at 1378 and *Tucker*, 958 F.2d at 1419. The latter

correctly concluded that disagreement with census methods does not create a constitutional claim.

Although Oklahoma contends otherwise, if the Court concludes that adjustment is a permissible choice under the law and then focuses on the Secretary's decision not to adjust, it is clear that his decision is nonetheless not subject to the heightened scrutiny imposed by the Second Circuit. Heightened scrutiny is not applicable because no constitutional rights were violated by the decision not to adjust. There is no constitutional right to census accuracy. The fact that the census undercount disproportionately affects minorities does not justify a higher standard of review. There is no allegation that the census was conducted in a manner to purposefully or intentionally undercount minorities. The district court properly reviewed the Secretary's decision under an arbitrary and capricious standard.

ARGUMENT

I.

13 U.S.C. § 195 PROHIBITS THE STATISTICAL ADJUSTMENT OF THE DECENNIAL CENSUS FOR APPORTIONMENT PURPOSES.

The narrow issue before this Court is whether the Court of Appeals for the Second Circuit correctly held that the Secretary must prove that his decision not to statistically adjust the 1990 census furthers a legitimate governmental objective and his decision is essential for achievement of that objective. *City of New York*, 34 F. 3d at 1131. This narrow issue, however, triggers the broader question: what do the

Constitution and statutes direct with respect to census adjustment? In this case, the Secretary's decision not to adjust was constitutionally permissible and statutorily required. A decision in favor of adjustment would have been contrary to the governing legislative mandate.

A. The Constitution Gives Congress The Power To Decide The Census Method; Congress Used This Power To Prohibit Adjustment.

The Constitution imposes two requirements on the census. It has to be taken every ten years and it must be taken in the manner specified by Congress:

> The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. Const. Art. I, § 2, cl. 3.

Congress exercised the power granted to it by the Constitution and passed the Census Act. Within the Census Act, Congress decided that when a census is used to apportion Representatives,[3] the Secretary cannot use sampling to adjust the actual enumeration:

---

[3] The Constitution requires that the decennial census be used to apportion representatives "among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. Art. 1 § 2, cl. 3.

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195. App., *infra* 6.

Congress also decided that when a census is used for purposes other than apportionment, sampling is permissible:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

13 U.S.C. § 141.

Under § 141, Congress authorized the Secretary to use sampling and special surveys to collect different types of information which are targeted by the census. As defined by § 141, the census collects information beyond a population count. It inquires into housing matters and related issues and other subjects chosen by the Secretary. 13 U.S.C. § 141(g) ("census of population" defined to mean a census of population, housing and matters related to population and housing); 13 U.S.C. § 141(f) (Secretary shall submit, for

congressional approval, the subjects proposed to be included and the types of information to be compiled in the census).

In this case, the Secretary's decision not to adjust the census complies with the Constitution and with the Census Act. The Secretary conducted the census in "such Manner as [Congress] shall by Law direct" because he complied with § 195's prohibition against adjustment. Congress directs that sampling shall not be used for apportionment purposes and the Secretary did not do so. As a matter of law, the Secretary could not have decided otherwise.

B. The Statutory Text Is Clear; Adjustment Is Prohibited.

The conclusion that Congress prohibits the statistical adjustment of the census for apportionment is consistent with the Constitution, it is consistent with § 141(a), and it is consistent with § 195. The text is clear. The analysis should end. *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Id.* at 108; *Negonsott v. Samuels*, 113 S. Ct. 1119, 1123 (1993) (Court's task is to give effect to Congress' will and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive). When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). As Justice Holmes emphasized, "We do not inquire what the legislature meant; we ask only what the statute means." *S & E Contractors, Inc. v. United States*, 406

U.S. 1, 14 n. 9 (1972), *quoting* Holmes, *The Theory of Legal Interpretation*, 12 Harv.L.Rev. 417, 419 (1899).

In the debate over adjustment, however, much has been made of a perceived conflict between §§ 141(a) and 195. In order to resolve this supposed conflict and give meaning to both provisions, reviewing courts have reached the strained conclusion that sampling is permissible for apportionment purposes, but not required, and if used, it must be done in conjunction with traditional counting methods. *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *see also City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980) (Constitution's "actual enumeration" requires that census be at least based on raw data obtained by actual headcount but § 195 permits sampling for apportionment purposes, though it does not require sampling); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), rev'd on other grounds, 642 F.2d 617 (6th Cir. 1981) (§ 195 merely prohibits the use of figures derived solely by statistical techniques; it does not prohibit the use of statistics in addition to traditional measuring tools to arrive at more accurate population count).

In this case, the district court also held that to give effect to both §§ 195 and 141(a), it must be concluded that, in the apportionment area, sampling may be used but only in addition to traditional counting methods. *City of New York v. United States Dept. of Commerce*, 739 F. Supp. 761, 767-68 (E.D.N.Y. 1990). The Second Circuit concluded that § 195 actually encourages census adjustment for apportionment purposes. *City of New York*, 34 F.3d at 1125.

The most obvious problem with this application of §§ 141(a) and 195 is that it ignores the clear language of both

statutes. In interpreting a statute a court should always turn first to one cardinal canon before all others. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 1149, *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981).

Section 195 does not say that sampling *may* be used for apportionment or that sampling can be a *part* of the apportionment count.[4] Section 195 clearly states that sampling shall not be utilized to obtain the count which is used for the apportionment of congressional representatives. 13 U.S.C. § 195.

Similarly, § 141(a) does not say that sampling can be used for apportionment. Instead, it provides that sampling can be used with the census. The remaining provisions in §141 direct that the census shall obtain different types of information which are used for different purposes. Sampling may be perfectly appropriate to arrive at a count which

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[4] It has been concluded that when Congress amended § 195 in 1976, it intended to strengthen the use of sampling where apportionment was not involved and thus substituted "shall" for the word "may." *City of New York*, 34 F.3d at 1125; *Young*, 497 F. Supp. at 1334. Under this analysis, sampling is permissible for apportionment but cannot be a required component of an apportionment count. This analysis ignores that Congress, even when amending, retained the plain prohibition of § 195. Notedly, the Secretary retains discretion in both the original and amended versions of § 195. The original version authorizes sampling when "he deems it appropriate" and the amended version directs sampling "if he considers it feasible." 13 U.S.C.§ 195.

reflects housing, education, income or vocation patterns. When a count is used to apportion representatives, however, sampling is not permitted. 13 U.S.C. § 195.

C. The Legislative History Supports The Conclusion That § 195 Prohibits Adjustment.

Although not necessary to resolve this issue, the legislative history of § 195 supports the conclusion that this section actually means what it says and prohibits the use of sampling for apportionment purposes. When § 195 was first enacted in 1957,[5] the House Report stated:

> Section 195 provides that the Secretary of Commerce may authorize the use of the statistical method known as sampling in carrying out the purposes of title 13, if he deems it appropriate. However, section 195 does not authorize the use of sampling procedures in connection with the apportionment of Representatives.
>
> The purpose of section 195 in authorizing the use of sampling procedures is to permit the utilization of something less than a complete enumeration, as implied by the word "census," when efficient and accurate coverage may be affected through a sample survey. Accordingly, except with respect to

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[5] As originally enacted, § 195 stated: "Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

> apportionment, the Secretary of Commerce may use sampling procedures when he deems it advantageous to do so.[6] [Emphasis added.]

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[6] U.S. Cong. House Comm. on Post Office and Civil Service. Revision of Census Law. Report to Accompany H.R. 7911. H.R. Rep. No. 1043, p. 10, 85th Cong. 1st Sess. Washington, U.S. Govt. Print. Off., 1957, *and cited in* Cong. Res. Serv. Rep. for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, pp. 85-86, 96th Cong., 2d Sess. (Comm. Print 1980).

Rep. Beckworth also entered a statement into the record that recognized the census collects different types of information in addition to a headcount and that sampling may be proper for the collection of this information: "The use of sampling procedures would be authorized by the proposed new section 195. It has generally been held that the term 'census' implies a complete enumeration. Experience has shown that some of the information which is desired in connection with a census could be secured efficiently through a sample survey which is conducted concurrently with the complete enumeration of other items; that in some instances a portion of the universe to be included might be efficiently covered on a sample rather than a complete basis and that under some circumstances a sample enumeration or a sample census might be substituted for a full census to the advantage of the Government. This section . . . would give recognition to these facts and provide the necessary authority to the Secretary to permit the use of sampling when he believes that it would be advantageous to do so." Hearing, H.R. 7911, 85th Cong., 1st Sess. (June 19, 1957) *and cited in* Cong. Res. Serv. Rep. for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, 96th Cong., 2d Sess. (Comm. Print 1980).

The Senate Report also stated that sampling was not permitted for apportionment:

> A third part of section 14 gives the Secretary authority to use sampling in connection with censuses except for the determination of the population for apportionment purposes. The proper use of sampling methods can result in substantial economies in census taking.[7]

When enacted, § 195 prohibited the use of sampling to arrive at a population count for apportionment. When Congress amended § 195 in 1976, it did not substantially change the language of that provision. Most significantly, the 1976 amendment did not remove the reference to apportionment. If Congress originally meant to exclude sampling from apportionment and it left that exclusion in when it amended the statute, then one must conclude that the prohibition remains in force. This conclusion is further supported by the legislative history behind the 1976 amendment to § 195. The focus of the 1976 amendments to the Census Act was to provide for a mid-decade census, *not*

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[7] S. Rep. No. 698, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1706, 1708.

to address sampling or adjustment.[8] Section 141(a) was amended to distinguish between the two censuses and:

> New language is added at the end of the subsection to encourage the use of sampling and surveys in the taking of the decennial census.

S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5466.

The 1976 amendment revised § 195 to:

> require that the Secretary of Commerce authorize the use of sampling procedures in carrying out the provisions of this title whenever he deems it feasible, except in the apportionment of the U.S. House of Representatives. This differs from present language which grants the Secretary discretion to use sampling when it is considered appropriate. The section as amended strengthens congressional intent that,

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[8] "The main purpose of the 1976 amendment was to provide for a mid-decade census to be used for various purposes (not including apportionment)." *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2784 n. 16 (1992). *See also* S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5463, "The Committee . . . to which was referred the bill (S. 3688) to amend title 13, United States Code, to provide for a mid-decade census of population, and for other purposes . . ." *and* the Statement portion of the Senate Report which contains an extensive review of the rationale behind a mid-decade census.

whenever possible, sampling shall be used. [Emphasis added.][9]

The text is clear and the legislative history is clear. Section 195 originally prohibited sampling for apportionment and it still does. Here, the litigation debate between the Executive Branch members and those favoring adjustment has focused primarily on whether the Secretary's administrative decision was constitutionally flawed. Oklahoma, on the other hand, contends adjustment is prohibited and the Secretary had *no* authority to decide other than as he did. The real question should be, if § 195 means what its plain language says, is the statute unconstitutional?

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[9] S. Rep. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5468. Also, in 1980, a bill was introduced which would have specifically amended §§ 141(a) and 195 to "require the bureau of the Census to adjust the population figures, employing the best available methodology to correct for undercounting for all purposes, including reapportionment." S. 3063, 96th Cong., 2d Sess. (1980), 112 Cong. Rec. at S. 22,856 (daily ed. Aug. 25, 1980). The bill was rejected. Statistical adjustment of the census for apportionment purposes was not adopted.

In 1980, a report was prepared by the Congressional Research Service for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, 96th Cong., 2d Sess., (Comm. Print 1980), which supports this conclusion. After an extensive analysis of constitutional and statutory provisions and the legislative history of the Census Act and its amendments, the Report concluded that the use of sampling for apportionment purposes is not prohibited by the Constitution but is prohibited by § 195. The Report found that sampling could be used for all other purposes of the decennial census. Report, at p. 88.

If not (because the manner of conducting the census is textually delegated to Congress), then a decision consistent with this plain language should not be subject to challenge.

Finally, even if § 195 can somehow be read to not expressly prohibit a statistical adjustment for apportionment purposes, no basis exists to set aside the Secretary's decision. If, contrary to Oklahoma's reading, Congress has statutorily allowed the Secretary to have this option, the Constitution permits Congress this type of judgment. That being the case, there is no basis to now set aside the Secretary's decision, in the absence of any claim that the Secretary has carried out the census count contrary to the instructions of Congress.

II.

CONGRESS' LEGISLATIVE DECISION REQUIRES JUDICIAL DEFERENCE, FURTHERS THE IMPORTANT GOALS OF POLITICAL STABILITY AND PUBLIC CONFIDENCE AND INVOKES NO JUSTICIABLE STANDARDS.

A. The Statutory Prohibition Against A Census Adjustment Commands Deference From The Judiciary.

The Constitution does not specify the method for the census. Instead, the Constitution explicitly commits to Congress the decision of determining the "manner" in which the census is to be performed. The Constitution expressly directs Congress to use its discretion when exercising this power.

The Constitution also authorizes Congress to enact legislation that "shall be necessary and proper" to carry out its delegated responsibilities. U.S. Const. Art. I, § 8, cl. 18. Once an object is within the authority of Congress, the means by which it will be attained is for Congress to determine. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (it is not for courts to oversee the choice of boundary line in implementing federal statute nor sit in review on size of a particular project area; once the question of public purpose has been decided, the amount of land to be taken and the need for a particular tract to be used in the plan rests in the discretion of the legislative branch).

Within the limits of a constitutional grant, Congress may implement the stated purpose by selecting the policy which in its judgment best effectuates the constitutional aim; this is but a corollary to the grant to Congress of any Article I power. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *Kinsella v. United States*, 361 U.S. 234, 247 (1960) (as James Madison explained, the Necessary and Proper Clause is "but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant").

Congress answered the constitutional directive and decided that sampling should not be used for apportionment purposes. 13 U.S.C. § 195. Congress reviewed the adjustment issue in 1957 and in 1976. Each time, it chose not to allow a statistically estimated adjustment to the census for apportionment purposes. Its good-faith choice of an "actual enumeration" method, practiced for over two hundred years, commands deference from the judiciary. *United States Dept. of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992) (Congress' choice of apportionment method upheld; Congress' decision commands far more

deference than a state redistricting plan); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (judging constitutionality of Act of Congress is the gravest and most delicate duty that this Court performs and analysis begins with no less deference than the Court customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government); *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (Court should afford great weight to decisions of Congress even though legislation implicates fundamental First Amendment or equal protection rights).

B. Congress' Prohibition Against Census Adjustment Furthers Political Stability And Public Confidence.

Congress' decision that the decennial census should not be statistically estimated for apportionment purposes furthers the important goals of political stability and public confidence in government. At the heart of Oklahoma's concern is whether, without a thorough policy debate in Congress, the important limitation contained in § 195 is going to be read out of the statute. If that occurs, even judicial deference to the Secretary's current decision will subject an important national process to the political arena. The process employed for future censuses would be viewed as a politicized one, and the attendant loss of integrity insurmountable. If one administration can make post-enumeration adjustments to the actual headcount, then any methodology for adjustments will be subjected to partisan argument.

Likewise, if the judiciary should enter the business of managing the census, then both federal and state political processes would be, at best, disrupted, and at worst, halted.

If census adjustment were permissible, then any State which would lose a Representative under the formula adopted by the Census Bureau could find a different formula which arguably produced a "better count." Different formulas could create conflicting decisions among federal courts which would require perpetual resolution by higher courts and, ultimately, this Court. In this case, a decision *not* to adjust produced conflicting decisions involving three circuits: *City of New York*, 34 F. 3d at 1131, *Tucker*, 958 F.2d at 1419, and City of Detroit, 4 F.3d at 1378.

These types of conflicts take years to resolve. This challenge to the methodology of the 1990 decennial census began in 1988. This Court will receive argument in 1996. Over seven years of litigation have elapsed and the issue is not yet resolved. If yet another district court decision and appeal are required, the decennial census will have produced a decennial lawsuit!

These types of cases also involve enormous amounts of complex expert testimony and evidence. In this case, the trial lasted for 13 days, consisted almost exclusively of expert testimony and the transcript exceeded 2,600 pages. One exhibit alone contained over 12,000 documents and 18,000 pages. *City of New York*, 822 F. Supp. at 917. If litigation becomes the method of choosing a census adjustment formula, then the process of seating the government will be placed on hold until the last judicial review occurs. A delayed count or a substituted count becomes a realistic possibility.

The prospect of judicial scrutiny and debate over the choices of census methodology threatens the machinery of government at the national and state levels. The census is an integral part of the ignition system. It is essential and it

must fire on time. If it is missing or if it fires late, then the machinery does not work.

By statute, the census must be completed and the results reported to the President within nine months after April 1st of the year in which the census is performed. 13 U.S.C. § 141(b). The President must notify Congress, within one week of commencement of the first regular session, of the number of representatives to which each State is entitled. 2 U.S.C. § 2a(a). Within fifteen days of the President's notification, the Clerk of the House of Representatives must send this information to the Governor of each State. 2 U.S.C. § 2a(b). If the count is delayed, then these events will not occur within the statutory timetable. As long as there is no final count, districts within States cannot be drawn and representatives cannot be elected.

A delayed census puts the entire process on hold. Neither the Constitution nor the statutes anticipate that a census count may be held up while the judiciary reviews or replaces an adjustment formula. There is no statutory or constitutional procedure to use in the interim. Political stability and public confidence are lost when government is halted because it cannot determine even its own composition.

A cornerstone of our constitutional system of government is the ability to convene a properly constituted and recognized government in a timely manner without protracted constitutional challenges over reapportionment and the redistricting process. In Oklahoma, the transfer of state political power is keyed to the decennial census. Oklahoma is bound by its state Constitution to use the census to draw its congressional districts. The state Constitution also demands that redistricting be completed quickly: within ninety (90) days after the convening of the first regular

session of the state legislature following the federal decennial census. Okla. Const. art. V, § 11A.

Developing a state redistricting plan is a monumental task. In Oklahoma, it encompasses districts for 101 state representatives, 48 state senators and 6 Congressmen. Jt. App. at 103.[10] After legislative boundary lines are drawn, county commissioners in each of Oklahoma's 77 counties must redraw their district boundaries. Each county must also redraw its precincts. It requires extensive commitments of time, resources and money. Oklahoma spent over $1 million on its 1991 redistricting alone. Jt. App. at 105.

It is also unclear how a repeat run would occur. Oklahoma's Constitution did not anticipate that the federal decennial census might result in two counts or in a delayed count. The state Constitution does not provide for a procedure for a retake and it is not even clear who would perform the second round of redistricting. The Oklahoma Constitution states that an Apportionment Commission shall be created if the legislature fails to make the required apportionment within the time provided. Okla. Const. art. V, § 11A. Resolution of whether a three person committee or the legislature should redistrict would undoubtedly create debate and litigation and would not be conducive to political stability or public confidence in government.

Political stability at both the federal and state level is obviously a vital concern. It is also a concern that is directly impacted by census adjustment. Congress' decision

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[10]References to "Jt. App." are to the joint appendix filed in this appeal.

not to adjust the census solves the problem because it allows the legislative branch to change its composition without delaying or halting the business of government.

C. No Justiciable Standards Exist For Reviewing The Census.

The analysis of whether an issue presents a claim that can be resolved by justiciable standards is often made in the context of the political question doctrine. The Court rejected that doctrine in a case which concerned Congress' selection of apportionment methods. *Montana*, 112 S. Ct. at 1430. Although it is now questionable whether the doctrine could be applied here to say the conduct of the census presents a non-justiciable question in the constitutional sense,[11] an analogy can clearly be drawn between elements of the doctrine and this case. This analogy leads to the conclusion

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[11] *See Nixon v. United States*, 113 S. Ct. 732 (1993) (claim that Senate rule violated Impeachment Trial Clause was nonjusticiable; the word "try" in that clause does not provide an identifiable textual limit on the authority committed to the Senate); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (Court found no justiciable claim; where Constitution gives Congress the power to prescribe military training, judiciary should not undertake to review a wide range of possible procedures; such a review would be inappropriate even in the unlikely event that the judge possesses the requisite technical competence to do it).

In this case, as in *Nixon*, there is no constitutional or statutory text under which to resolve the issue and assess census methodology. The phrase, "in such manner as [Congress] by law shall direct" does not provide a sufficient textual basis to create a justiciable standard.

that courts should not manage the business of taking the census.[12]

Here, the Constitution's explicit textual language, unaccompanied by any restrictions, makes clear that the "manner" of conducting the census is committed to Congress. By virtue of this language, "responsibility for conducting the decennial census rests with Congress." *Baldridge v. Shapiro*, 455 U.S. 345, 347-48 (1982).

Neither the statutes nor the Constitution speak to the issue of standards. As recognized by the Seventh Circuit Court of Appeals:

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[12] Under the political question doctrine, judicial review should be declined where there is:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Montana, 112 S. Ct. at 1424, *citing Baker v. Carr*, 369 U.S. 186 (1962).

> The plaintiffs' claim to a census adjustment invokes no judicially administrable standards. The plaintiffs are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount.

Tucker, 958 F. 2d at 1418.

In the trial of this case, the district court was asked to review an enormously complex adjustment proposal but with no legal standards to use to judge it. This proposal: (1) created 1,392 poststrata on the basis of age, sex, race, Hispanic origin, housing tenure, the type of place and geographic location; (2) utilized a "homogeneity assumption" that persons in each poststratum were homogeneous with respect to the probability of being missed by the census; (3) identified 5,000 blocks which fairly represented these poststrata; (4) calculated 1,392 poststratum raw adjustment factors to reflect variations found in the Post-Enumeration Survey ("PES") conducted within these 5,000 blocks; (5) "smoothed" the 1,392 raw factors by both "modelling" and "regression" exercises; and (6) used a mathematical model to impute missing characteristics in order to match the census record to the PES to determine whether an undercount occurred. The accuracy of the adjusted count was checked against a Demographic Analysis ("DA") which estimated population and subpopulations through administrative records such as birth and death certificates and immigration statistics. *City of New York*, 822 F. Supp. at 915-16, 921, 923.

There are no justiciable standards which the district court could have used to decide whether the proposed 1,392 "smoothed," "modelled" and "regressed" adjustment factors are the best factors to use. There are no legal standards by which to gauge imputation and undercount ratios or the variance of the PES from the DA. There are no standards and no law to apply to a given formula to determine whether it is required or even permissible.

The power to exercise discretion to decide census methodology is clearly committed to the Congress, not the judiciary. A court's independent decision on this question would ignore Congress' right to direct the census process and demonstrate a lack of respect for that branch of government. Regardless of one's interpretation of 13 U.S.C. § 195, the policy for the past two hundred years has been to use an actual count and *not* to statistically adjust the census.

Finally, adjustments beget adjustments. If left to judicial review, this issue could result in different courts choosing different paths for one census, in the quest for greater accuracy. The lack of identifiable standards almost guarantees that not all courts would take the same side in a dispute among census officials, statisticians and demographers.

III.

CENSUS ADJUSTMENT IS NOT REQUIRED BY EITHER THE CONSTITUTION OR THE GOAL OF VOTER EQUALITY.

Nothing in the Constitution requires that Congress adjust the census. In this case, there is no allegation that intentional discrimination against a protected class caused the census undercount. Those in favor of adjustment may contend that the Constitution creates a right of census accuracy or that adjustment is required under the one-person-one-vote standard announced by this Court in prior cases. *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Karcher v. Daggett*, 462 U.S. 725 (1983). Neither the Constitution nor voter equality compels statistical adjustment of the census.

The Constitution's text does not address census accuracy. It does not require a specific level or type of accuracy and it does not specify the means to obtain a census count, accurate or otherwise.

As held in *Montana*, the one-person-one-vote standard does not provide the means to resolve all issues in this area: "The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course." *Montana*, 112 S. Ct. at 1429. This Court recognized in *Montana* that the goal of absolute mathematical equality is illusory under the constraints imposed by the Constitution. The constitutional guarantee of a minimum of one Representative for each State and the need to allocate a fixed number of Representatives among 50 States of different populations make absolute voting equality impossible. *Id.* at 1429.

Neither the Constitution nor the goal of voter equality provides a standard by which a court can choose a particular formula to adjust the census. Neither source gives guidance as to whether 5,000 blocks or 10,000 blocks should be used or where those blocks should be located or whether 1,392 strata are sufficiently homogeneous to support an adjustment formula. Neither source determines whether it is best to have a final count which is more accurate from the standpoint of total numbers but is less accurate with respect to distributing those numbers across the United States.

In this case, the Secretary's decision not to adjust was based, in part, on his conclusion that there was "little or no evidence that the adjusted counts led to greater distributive accuracy at local levels." *City of New York*, 822 F. Supp. at 922. There are no standards under which a court could decide whether total number accuracy or distributive accuracy is required by the law.

Neither the Constitution nor the goal of voter equality determines whether it is best to leave real people in the count or remove them and replace them with a "best guess." The adjustment formula proposed in this case would delete actual people and replace them with an adjusted number. *Id.* at 922, n. 21. The deletion of real people from the final count could undermine the public's willingness to respond to the census. If one is going to be replaced by a "best guess" then one may not take the time to send in the form. It may also diminish the incentive of local governments to make efforts to increase census participation. A State may instead choose to concentrate on lobbying for a particular adjustment formula. Neither of these results lead to a more accurate census.

IV.

THE FINAL RESULT REACHED BY THE SIXTH AND SEVENTH CIRCUITS IS CORRECT.

The Second Circuit Court of Appeal's decision conflicts with the rulings of the Sixth and Seventh Circuits which upheld the Secretary's decision not to adjust the 1990 census. *City of Detroit*, 4 F.3d at 1378; *Tucker*, 958 F.2d at 1419. The latter decisions did not address § 195. Nevertheless, the Sixth and Seventh Circuits reached the correct result. Oklahoma was not a party to these cases.

Both the Sixth and Seventh Circuits recognized that the apportionment clause does not create a constitutional right to census accuracy. *City of Detroit*, 4 F.3d at 1375; *Tucker*, 958 F.2d at 1417. The Seventh Circuit reasoned:

> It might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a judicially administrable standard. There is nothing of that sort, and the inference is that these enactments do not create justiciable rights.

Tucker, 958 F.2d at 1417.

A court could properly review a claim that Congress did not conduct the census, or did not do so in good faith or intentionally reduced some group's representation. Judicial review of census methodology, however, is not authorized

by the Constitution. *City of Detroit*, 4 F. 3d at 1376. A court cannot provide a remedy for a census undercount which is unintentional and is "merely an accident of the census-taking process." *Tucker*, 958 F.2d at 1413. Judicial review is also improper because the claim of one State or city cannot be considered in isolation. The consequences for other States and cities must be weighed. *City of Detroit*, 4 F.3d at 1378.

The Sixth and Seventh Circuits rejected the same claim that the Second Circuit found to merit heightened scrutiny. The Sixth and Seventh Circuits reached the correct result. The conflict among the circuits should be resolved by this Court.

V.

THE COURT OF APPEALS ERRED WHEN IT IMPOSED A STANDARD OF REVIEW OTHER THAN ARBITRARY AND CAPRICIOUS.

If one assumes the Secretary is lawfully permitted the choice of utilizing statistical estimates for apportionment purposes, then it is clear that his decision is not subject to the heightened scrutiny imposed by the Second Circuit. The Administrative Procedures Act ("APA") sets out the required scope of review of agency decisions. The APA provides:

> . . . The reviewing court shall --
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --

> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity; . . .

5 U.S.C. § 706.

The district court reviewed the Secretary's decision in accordance with the mandate of the APA and determined that "the Secretary's decision not to adjust the 1990 census count was neither arbitrary nor capricious." *City of New York*, 822 F. Supp. at 929. On appeal, the plaintiffs argued that the refusal to adjust the census violated the apportionment clause of the Constitution and, therefore, the district court should have imposed a *de novo* standard of review.

The Court of Appeals rejected the plaintiffs' plea for *de novo* review. The court, however, did impose a heightened scrutiny, ruling that the agency's decision (1) had to further a legitimate governmental objective and (2) be essential for the achievement of that objective. The decision of the Court of Appeals was based on the premise that the Secretary's decision not to adjust the census involved violations of the Apportionment Clause and the Fourteenth Amendment.

The flaws in the Second Circuit's opinion, however, are that (1) this is not a case involving apportionment and (2) the agency decision does not involve State action. Because the case does not involve violation of constitutional rights, the scope of review is limited to whether the agency decision was arbitrary or capricious.

The Second Circuit relied on the disproportionment undercount of racial minorities to justify heightened scrutiny. *City of New York*, 34 F. 3d at 1129. The Second Circuit was wrong. It was wrong because the performance of the census involved no intentional conduct to reduce the count of minority residents. The law does not hold that an "official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Washington v. Davis*, 426 U.S. 229, 239 (1976) (emphasis in original). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). If there is proof that a discriminatory purpose was a motivating factor behind the official act in question, then "judicial deference is no longer justified." *Village of Arlington Heights*, 429 U.S. at 266.

In this case, there is no allegation that the Secretary intended to undercount minorities. It is also undisputed that the census cannot achieve an exact count of the nation's population. There is no basis upon which to support a heightened review of the Secretary's decision not adjust the census.

The Second Circuit attempted to avoid the requirement of intentional discrimination by analogizing this case to *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry*, 376 U.S. at 8; and *Reynolds v. Sims*, 377 U.S. 533 (1964). Each of these cases, however, dealt with apportionment or districting schemes within a particular State.

As recognized by the Second Circuit:

> There are, of course, differences between the present case and the *Wesberry/Reynolds v. Sims* line of cases because the present case focuses not on action by a state within its boundaries but rather on federal action that is nationwide in scope.

City of New York, 34 F.3d at 1129.

The *Wesberry* one-person-one-vote standard addresses the division of one fixed number by another fixed number. The population of the state is divided by the number of congressional representatives allowed to that state. This equation is easily solved and it readily provides a concrete number that can be used to measure the accuracy of the districting plan.

This case, however, concerns counting not solving an equation for an answer. There is a major conceptual difference between the two problems. In reviewing the Secretary's decision not to adjust the census, there is no equation and there is no resulting number to provide guidance. This case cannot be analyzed in the same manner as the apportionment cases.

The Seventh Circuit Court of Appeals, in *Tucker*, also rejected the claim that the refusal to adjust should be reviewed under the same standard as apportionment and voting rights cases:

> The plaintiffs cannot be serious in arguing that the refusal to adjust the headcount violates the Voting Rights Act. That Act

> provides remedies only against "any State or political subdivision" of a state. 42 U.S.C. § 1973; and see §§ 1973a to 1973dd-5. The Fourteenth Amendment is likewise limited to state action. The plaintiffs' invocation of these enactments is a throwaway.

Tucker, 958 F.2d at 1414.

The court also analyzed the plaintiffs' argument that failure to adjust the census violated the apportionment clause. The court again distinguished *Wesberry*, *Reynolds* and other cases relied on by the plaintiffs and found:

> The plaintiffs' main argument, however, is different from any we have mentioned. It is derived from a constitutional right neither to equal voting power nor to freedom from governmental discrimination, but to census accuracy.

Id. at 1415.

There is no constitutional right to census accuracy. Thus, the decision not to adjust the census did not violate the Constitution. The standard of review then must be whether the Census Bureau's decision not to adjust was arbitrary and capricious. The Court of Appeals erred in imposing a burden of heightened scrutiny.

CONCLUSION

The State of Oklahoma respectfully requests that the Second Circuit Court of Appeals' decision be reversed and

that the Secretary's decision not to adjust the 1990 census be upheld.

Respectfully submitted,

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November 9, 1995

APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clauses 1 and 3 of the United States Constitution provide:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> * * * * *
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration

> shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

2. Article I, Section 8, Clause 18 of the United States Constitution provides:

> **Section 8**. The Congress shall have Power
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Sections 2 and 5 of the Fourteenth Amendment to the United States Constitution provide:

> **Section 2**. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or

the members of the Legislature thereof, is denied to any one of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 2 U.S.C. § 2a provides:

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each

State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall

be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

5. 13 U.S.C. § 141(a) and (b) provide:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a

decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

* * * * *

6. 13 U.S.C. § 195 provides:

Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

* * * * *

(10) (8) (8)

Nos. 94-1614, 94-1631 and 94-1985

Supreme Court, U.S.
FILED
NOV 8 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN, PETITIONER
v.
CITY OF NEW YORK, ET AL.

STATE OF OKLAHOMA, PETITIONER
v.
CITY OF NEW YORK, ET AL.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS
v.
CITY OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTION PRESENTED

Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment to the 1990 census violated the Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners, defendants below, are: United States Department of Commerce; Ronald H. Brown, Esq., As Secretary of the United States Department of Commerce; Everett Ehrlich, As Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Harry Scarr, As Acting Director of Bureau of Census; William J. Clinton, As President of the United States; Dan Glickman, As Secretary of Agriculture; Donna E. Shalala, As Secretary of Health and Human Services; Henry Cisneros, As Secretary of Housing and Urban Development; Robert B. Reich, As Secretary of Labor; Federico Peña, As Secretary of Transportation; Richard W. Riley, As Secretary of Education. The State of Wisconsin and the State of Oklahoma, intervenor-defendants below, are also petitioners.

Respondents, plaintiffs below, are: City of New York; State of New York; City of Los Angeles; City of Chicago; City of Houston; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; Jerry Alan Wood; Carolyn Sue Lopez; City of Atlanta, Georgia; Maynard Jackson, Individually, and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New

Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernadino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona; Council of Great City Schools. By virtue of Rule 12.6 of this Court, Donnald K. Anderson, As Clerk of the United States House of Representatives, a defendant below, is also a respondent in this Court.

The following were parties to the proceedings in the district court, but were not parties to the proceeding in the court of appeals: People of the State of California *ex rel.* Daniel E. Lungren, Attorney General; and County of Hudson, New Jersey.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1614

STATE OF WISCONSIN, PETITIONER
v.
CITY OF NEW YORK, ET AL.

No. 94-1631

STATE OF OKLAHOMA, PETITIONER
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CITY OF NEW YORK, ET AL.

No. 94-1985

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS
v.
CITY OF NEW YORK, ET AL.

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40)[1] is reported at 34 F.3d 1114. The opinions of the district court (Pet. App. 41-95, 96-120, 121-134) are reported at 822 F. Supp. 906, 739 F. Supp. 761, and 713 F. Supp. 48. The decision of the Secretary of Commerce (Pet. App. 135-415) is published at 56 Fed. Reg. 33,582.

[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 94-1614.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1994. The petitions for rehearing filed by the States of Oklahoma and Wisconsin were denied on December 12, 1994, and January 4, 1995, respectively. Pet. App. 416-418, 419-421. The petition for a writ of certiorari in No. 94-1614 was filed by Wisconsin on April 3, 1995. The petition for a writ of certiorari in No. 94-1631 was filed by Oklahoma on April 4, 1995. On March 27, 1995, Justice Ginsburg extended the federal petitioners' time for filing a petition for a writ of certiorari to and including May 4, 1995. On April 25, 1995, Justice Ginsburg further extended the time for filing to and including June 3, 1995. The petition for a writ of certiorari in No. 94-1985 was filed by the federal petitioners on June 5, 1995 (a Monday). The three petitions were granted on September 27, 1995. J.A. 109-111. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also notes 16 and 23, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clause 3, of the United States Constitution; the Fifth Amendment and Section 2 of the Fourteenth Amendment to the Constitution; 2 U.S.C. 2a; and 13 U.S.C. 141(a) and (b) are reproduced in relevant part at Pet. App. 422-425.

STATEMENT

A. Constitutional And Statutory Framework

The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives * * * shall be apportioned among the several States * * * according to their

respective Numbers" (the Apportionment Clause) and directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct" (the Census Clause). See also Amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

Pursuant to the Census Clause, Congress has provided in the Census Act that the decennial census shall be conducted by the Secretary of Commerce "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). Congress has, however, prescribed a strict timetable for the census. The population of the United States is to be determined as of April 1 of the census year. The "tabulation of total population by States" for the purpose of apportionment of Representatives is to be completed and reported to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Within a week of the beginning of the first Session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State * * * and the number of Representatives to which each State would be entitled" under the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-455 (1992). Within 15 days of receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b). Following the 1990 decennial

census, the President transmitted the statement of the apportionment of Representatives to Congress on January 3, 1991, see 27 Weekly Comp. Pres. Doc. 6 (1991), and the Clerk then sent the required certificates to the Governors of the 50 States.

B. The 1990 Census

The 1990 decennial census was conducted in accordance with an elaborate, multi-staged procedure designed to locate and identify each housing unit in the country and to enumerate each person in those units by means of a system replete with rechecks and cross-checks.[2] The Census Bureau employed approximately 500,000 temporary workers, including 300,000 interviewers, in its efforts to obtain an accurate count of the population. Tr. 1743. Although those processes resulted in a very high rate of success, it is undisputed that many persons were not counted. The Secretary of Commerce originally estimated that the census enumeration had failed to count 2.1% of the population. Pet. App. 158. It was subsequently determined, however, that as a result of certain errors (including a computer processing error), that estimate significantly overstated the undercount; the Census Bureau represented at the trial in this case that the undercount was 1.6% of the population. *Id.* at 58 n.12; see Tr. 1786-1788; DX 21; see also Bureau of the Census,

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[2] That process included the development of comprehensive maps of each block in the United States, the identification of housing units on each block, test censuses and post-enumeration survey (PES) tests, the actual enumeration (including multiple contacts with each household that did not return a census questionnaire), and pre- and post-census review by state and local governments. See generally Pet. App. 319-332; *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1376 (6th Cir. 1993) ("the Census Bureau's efforts to conduct as accurate a census count as possible are extraordinary"), cert. denied, 114 S. Ct. 1217 (1994).

Department of Commerce, *Report of the Committee on Adjustment of Postcensal Estimates: Assessment of Accuracy of Adjusted Versus Unadjusted 1990 Census Base for Use in Intercensal Estimates* 15 (Aug. 7, 1992) (CAPE Report); 58 Fed. Reg. 70 (1993). That 1.6% undercount is approximately the same as the undercount in the 1980 census. Pet. App. 58 n.12.

It is undisputed that the undercount varied among population subgroups. The decision of the Secretary at issue in this case estimated that "Blacks appear to have been undercounted in the 1990 census by 4.8%, Hispanics by 5.2%, Asian-Pacific Islanders by 3.1%, and American Indians by 5.0%." Pet. App. 138-139. A differential undercount also exists among various other subgroups. For example, men are missed at a higher rate than women, the young are missed at a higher rate than the elderly, and renters are missed at a higher rate than homeowners. DX 1, at 457-458; Pet. App. 158.

C. Consideration Of An Adjustment To The 1990 Census

1. The problem of the overall undercount and differential undercounts among demographic groups led the Department of Commerce to consider a statistical adjustment to the 1980 decennial census. Ultimately, however, no adjustment was undertaken. That decision was challenged in a number of lawsuits, but none was successful. The action brought by the State of New York was not resolved until 1987. *Cuomo* v. *Baldrige*, 674 F. Supp. 1089, 1104 (S.D.N.Y. 1987).

In the same year that litigation regarding the 1980 census finally concluded, the Department of Commerce announced that no statistical adjustment would be made for the 1990 census. In the following year, respondents filed this suit, seeking to compel an adjustment to the 1990

census for all purposes for which the census is used, including the apportionment of Representatives among the States and the distribution of federal funds. Defendants included the President, the Secretary of Commerce, the Census Bureau and its Director, and the Clerk of the House of Representatives.[3]

In July 1989, prior to a hearing on respondents' request for a preliminary injunction, the parties entered into a stipulation under which defendants agreed to reconsider the adjustment question and to reach a decision by July 15, 1991. J.A. 61-67. Defendants also agreed that the Census Bureau would conduct a post-enumeration survey (PES) of at least 150,000 households in order to generate data on which a statistical adjustment could be based. J.A. 62. In accordance with the stipulation, the Secretary published proposed guidelines for public comment and ultimately adopted eight guidelines that he would consider in deciding whether to order an adjustment of the 1990 census totals. See 54 Fed. Reg. 51,002 (1989); 55 Fed. Reg. 9838, 9839-9842 (1990); Pet. App. 113-115.[4]

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[3] On February 8, 1989, counsel for the Clerk of the House of Representatives entered into a stipulation providing that the Clerk "neither objects nor consents to the relief requested by the plaintiffs in their complaint and takes no position with respect to the questions involved in this litigation." Stipulation Regarding Participation of Defendant Donnald K. Anderson at 1-2. The Clerk agreed to be bound by any judgment entered in the case and accordingly was "relieved of any obligation to answer the complaint or otherwise participate in this litigation." *Id.* at 2. We do not believe that injunctive relief was properly sought against the President. See *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2775-2776 (1992); *id.* at 2776-2777 (opinion of O'Connor, J.); *id.* at 2788-2790 (Scalia, J., concurring in part and concurring in the judgment).

[4] Those guidelines are reprinted in the district court's opinion of June 7, 1990, in which it considered respondents' contention that the guidelines were inconsistent with the Secretary's obligations under the

2. In July 1990, the Census Bureau conducted the PES, which involved an attempt to identify all individuals living in a selected sample of more than 168,000 housing units across the United States in order to determine whether those persons had been properly counted and located in the census. The Census Bureau placed persons in the PES in one of 1392 categories, called "post-strata," defined by five variables: age, sex, race and Hispanic/non-Hispanic ethnicity, geographic subdivision,[5] and home tenure (owner vs. renter). See Pet. App. 343 (giving examples of post-strata). The Bureau then estimated the rate at which individuals within each post-stratum had been accurately counted in the census. Data obtained from the PES were used to evaluate the accuracy of the original census and, through the use of a complex series of statistical and mathematical processes, to generate adjusted population estimates. See *id.* at 332-346.

a. In constructing the post-strata, the Census Bureau was required to make numerous choices and assumptions concerning how best to divide the population into groups that would have similar "capture probabilities" (*i.e.*, probabilities of being counted in the census). Reasonable alternatives to the 1392 post-strata would have produced different population estimates. To take one example, the PES divided the nation into geographic groups corresponding to the Census Bureau's census divisions (see Pet. App. 373) and assumed that the likelihood of being captured in the census was the same for persons within

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stipulation. See Pet. App. 113-115. The district court rejected that contention. *Id.* at 116-117.

[5] To define the geographic subdivision for a particular individual, the Bureau considered both the area of the country (*e.g.*, New England, Middle Atlantic) and the type of urban or rural area in which that individual resided. See Pet. App. 373-375.

each division who shared similar demographic characteristics. At the trial in this case, respondents' experts acknowledged that geographic groupings other than those used by the Census Bureau in conducting the PES might have been reasonable, and that those alternative groupings would have affected the outcome of the adjustment process. See Tr. 1440-1441 (testimony of Professor John W. Tukey); see also Tr. 1682-1683 (testimony of Steven Fienberg). Defendants' witness, Dr. Kenneth Wachter, also testified that alternative geographic groupings would have been equally reasonable, if not preferable, and would have produced different adjustment results. Tr. 2133-2142.

b. The Bureau compared the PES data with the census data to determine whether identified persons in the PES sample had been erroneously missed or counted by the census. That process was known as "matching." On some occasions, however, it was not possible to determine whether a particular person found in the PES had been recorded by the census, because incomplete census and PES forms made it impossible to determine whether PES records matched census records for some addresses. Pet. App. 169. In those instances, mathematical models were used to supply the missing data and then to "impute" a match status. *Id.* at 170. Experts disagreed over the level of error resulting from the imputation process. The Secretary's administrative decision declining to make an adjustment observed that "[t]he imputation scheme used for the PES is based on a series of assumptions that are mostly guesswork." *Ibid.*

c. By comparing the results of the PES with the results of the census, the Bureau developed an "adjustment factor" for each of the 1392 post-strata that estimated the percentage of the members of that post-stratum that were

undercounted or overcounted in the census,[6] as well as a "variance" for each of the adjustment factors.[7] The Bureau determined, however, that the initial or "raw" adjustment factor should not be used in making an adjustment because of the high level of "sampling error" (a type of error inherent in any attempt to extrapolate for the whole population based on a sample). See Pet. App. 345. Although the overall PES was an unusually large sample survey, the average post-stratum in the PES consisted of only about 300 people (377,000 persons in the PES divided by 1392 post-strata). See *ibid.*; DX 64, at 7; Tr. 2369-2370. In each post-stratum, moreover, only about 25 persons had been erroneously missed and about 15 persons erroneously counted in the original census. DX 64, at 7; Tr. 2369-2370. Any errors in those small numbers would produce significant changes in estimated undercounts or overcounts for the different post-strata. See DX 64, at 7; Tr. 2369-2370.

To deal with the problem of sampling error, the Bureau employed a "smoothing" procedure. In essence, smoothing sought to compensate for the relatively small number of persons in each post-stratum by combining data from many different post-strata, weighted on the basis of variables such as race or age. Pet. App. 219-220, 222. That attempt to correct for sampling error, however, introduced important new questions. The post-strata had been developed in the first place because they were believed to

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[6] The Secretary explained that "if the [estimated population based on the census and PES] for a particular post-stratum was 1,050,000 and the census count was 1,000,000, then the adjustment factor was 1.05." Pet. App. 344.

[7] The variance of an adjustment factor is an estimate of its random variation, see Pet. App. 223, calculated by squaring the standard error, see Tr. 2367.

represent groupings of persons with similar capture probabilities. See *id.* at 204-205. In combining post-strata in the smoothing process, the Bureau was required to make new assumptions as to which variables mattered and how those variables interacted to produce the undercount.

The Secretary's final decision discussed the smoothing process in considerable detail. See Pet. App. 219-226. One step of the smoothing process involved the calculation of a "flattened" estimate of the adjustment factor for each post-stratum. The "flattened" adjustment factor was derived by considering data from that post-stratum in conjunction with data from many other post-strata, through use of a statistical technique known as a linear regression. See *id.* at 222-223. To determine the "smoothed" adjustment factor, the Bureau calculated a "weighted" average of the raw and flattened adjustment factors, based upon the variances for the raw adjustment factors. If the variance for a particular adjustment factor was high, the smoothed factor would be closer to the flattened factor than to the raw factor; if the variance was low, the reverse would be true. *Id.* at 223.[8]

The smoothing procedure was subject to an additional complication. Due to the small size of each of the post-strata, the variances themselves (which were estimated from the sample data) were subject to substantial random variation. See Pet. App. 223. The Bureau therefore determined that the variances should also be smoothed, a process known as "pre-smoothing." *Ibid.*; see also Administrative Record (A.R.) 492 ("The Census Bureau * * * replaced the variances by a flatter, regression-based

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[8] As the Secretary explained, "[t]he smaller the random variation in a poststratum, the more the smoothed factor relies on the observed data and the less it relies on the regression estimate." Pet. App. 223.

set of approximations to them."). The smoothed variances were then used to smooth the adjustment factors (*i.e.*, to determine the weighted average of the raw and flattened adjustment factors for each post-stratum). See Pet. App. 223; see also *id.* at 377-415 (table of adjustment factors by post-stratum).

The effects of the smoothing procedure were significant. Dr. Ericksen and Dr. Tukey, who were members of the Special Advisory Panel (a group established pursuant to the stipulation, see J.A. 63-65), observed that the decision to "pre-smooth" the variances resulted in a substantial increase in the estimate of the net undercount, and in a 70% increase in the estimate of the differential undercount for minority residents. PX 142 (July 11, 1991, letter to Secretary Mosbacher) at 2. Dr. Wachter, who also was a member of the Special Advisory Panel, observed that "[t]he effect of deciding to use pre-smoothed rather than unsmoothed variances is to raise many of the adjustment factors by several percentage points and raise some by more than six percentage points. * * * These are huge changes for a decision of detail." A.R. 492; see Pet. App. 223-224. Indeed, a single highly technical decision to exclude certain data from the pre-smoothing model affected the process in such a manner as to cause a shift of a Representative as compared to the adjustment that would have occurred if those data had been included. Pet. App. 220.[9] The Secretary in his final decision expressed concern that "the statistical artifice of variance

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[9] The Bureau excluded from the pre-smoothing model variances from 28 post-strata on the extreme ends of the estimated adjustment factors, the so-called "outliers." Pet. App. 220. Respondents' expert acknowledged at trial that this exclusion was not required by any generally accepted statistical model. Tr. 851-854.

smoothing [wa]s making substantial differences in adjustment factors." *Id.* at 224.

d. Once final ("smoothed") adjustment factors were computed, the number of people in each post-stratum in a block was multiplied by the appropriate adjustment factor. Thus, if the adjustment factor for a post-stratum was 1.10, and a particular block was found in the enumeration to have 10 persons within that post-stratum, an adjustment would have required defendants to multiply that number by 1.10. Consequently, the block total would be adjusted upward by one person (10 x 1.1 = 11). This process would be repeated for every block in which members of that post-stratum had been counted in the census. Adjusted counts for larger areas—States, cities, counties, and congressional districts—were obtained by adding up the adjusted counts for the blocks within them. See Pet. App. 204-205, 346.

e. The adjustment process relied on the assumption that the undercount rate is constant throughout a post-stratum. For example, a post-stratum for white single male renters, aged 20-29, living in New York City "assumes" that the capture probability for a 29-year-old white male law firm associate living in a rented condominium in Manhattan is the same as the capture probability for a 20-year-old white male laborer who rents a room in Queens. If that "homogeneity" assumption were incorrect, the accuracy of adjusted counts for States, cities, counties, and congressional districts would be open to question. See generally Pet. App. 204-205. The importance of the homogeneity assumption was highlighted by Dr. Wachter, who explained that "[t]he homogeneity assumption, in a sense, is the whole ballgame." Tr. 2114.

The validity of the homogeneity assumption was therefore the subject of considerable concern and debate, and the Census Bureau expended substantial effort to address

it. Pet. App. 205-208. In a study known as "[P]roject P12" (*id.* at 205), the Bureau analyzed factors often correlated with undercounts and found, as the Secretary stated, that "these factors showed significant *heterogeneity* by state within post-stratum for well over 80% of the post-stratum groups." *Id.* at 207 (emphasis added). Dr. Wachter testified at trial that the Secretary's conclusions regarding the homogeneity assumption were supported by the detailed analysis of the Census Bureau in its Project P12 report, as well as by Dr. Wachter's independent analysis of Bureau data. Tr. 2154-2158.

D. The Secretary's Decision Not To Make An Adjustment

1. In making the final determination whether to adjust the 1990 census figures based on the PES, the Secretary of Commerce considered the views of a large and diverse array of persons both inside and outside the Department. He received advice from senior officials in the Economics and Statistics Administration (which includes the Census Bureau) and other senior advisors, as well as individual recommendations from each of the eight members of the Special Advisory Panel. Pet. App. 137, 139-140; see also *id.* at 258-319 (Secretary's summary and analysis of Special Advisory Panel recommendations). The Secretary also had access to a total of 21 studies that were performed in an effort to evaluate the PES, *id.* at 168, and he solicited and received extensive public comments on the question whether an adjustment should be made, *id.* at 137.

2. On July 15, 1991, the date established by the stipulation as the deadline for the adjustment decision,[10]

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[10] Guideline Six stated that, "[i]f sufficient data and analysis of the data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 census." Pet. App. 241. In his final decision, the Secretary noted that "because of the court imposed deadline for the decision, the analyses of

the Secretary issued his determination that the census headcount would not be statistically adjusted. Pet. App. 135-415. At the outset, the Secretary explained that the crucial question was not whether an adjustment would improve accuracy in terms of absolute numbers at the national level, but whether adjusted numbers would provide an improved account of the way the population is distributed among the States and their subdivisions. See *id.* at 141, 146-147, 161, 184. He noted that this focus on "distributive" rather than "numeric" accuracy follows from the constitutional purpose of the census, which is to apportion Representatives among the States, and from the other uses of the census, including intrastate electoral redistricting and the distribution of federal funds. See *id.* at 141, 184, 200-201. The Secretary also stated that, in accordance with the guidelines he had adopted to implement the parties' stipulation, the unadjusted figures would be regarded as the most accurate unless the adjusted numbers were shown to be more accurate. *Id.* at 184.[11]

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the data are far from complete." *Id.* at 243. He expressed "particular[] concern[] about problems in data quality and analysis that were revealed, or occurred, in the final weeks before the decision." *Ibid.*; see also, *e.g.*, *id.* at 144, 225 n.108, 244-246. The Secretary concluded, however, that "[n]otwithstanding my concerns about the effect the July 15, 1991, deadline had on research efforts, * * * sufficient data exist to permit me to decide whether to adjust the census." *Id.* at 247.

[11] Guideline One stated that "[t]he Census shall be considered the most accurate count of the population of the United States, at the national, State and local level, unless an adjusted count is shown to be more accurate." Pet. App. 151. The Secretary explained in his July 15, 1991, decision that "[t]he true population counts cannot be observed. However, classical statistics provides a standard way of approaching the required inference. In accordance with Guideline One, we take as a working (null) hypothesis that the actual enumerations in fact better characterize the true population. The adjusted counts are an alternative measure and the question is whether the available evidence

The Secretary concluded that a statistical adjustment would be likely to increase the overall numeric accuracy of the census at the national level. Pet. App. 184-185, 200. He further concluded, however, that the adjusted figures had not been shown to increase distributive accuracy, and that in fact "the evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration." *Id.* at 185. In support of that determination, the Secretary analyzed a variety of statistical disputes regarding the accuracy of the proposed adjustment, explaining that the adjustment process consisted of a series of statistical assumptions, each of which was susceptible to error. He also noted that the difficulty of his decision was increased by the "diversity of opinion among [his] advisors." *Id.* at 140. "The Special Advisory Panel split evenly as to whether there was convincing evidence that the adjusted counts were more accurate. There was also disagreement among the professionals in the Commerce Department, which includes the Economics and Statistics Administration and the Census Bureau." *Ibid.*

3. The Secretary analyzed at length the efforts made to estimate the relative accuracy of the adjusted and unadjusted numbers. Pet. App. 185-200. That inquiry focused largely on the Census Bureau's "loss function model," which the Bureau had developed to measure the "loss" from using the census as compared to the "loss" from using an adjusted count.[12] The Secretary concluded

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permits us to reject the hypothesis that the census better describes the true population." *Id.* at 184.

[12] The loss is the difference between each count and the "true population." Pet. App. 188-189. The "true population" is, of course, unknown. *Ibid.* Indeed, the purpose of an adjustment is to arrive at an estimate of the "true population." To deal with that problem, the Bureau attempted to create a hypothetical "true population" by tak-

that the loss function analysis involved so many uncertainties that its utility was questionable. *Id.* at 188-192. In the Secretary's view, however, the analysis tended to show that the adjusted figures were less accurate than the unadjusted count at every level from the state level down.

In this regard, the Secretary noted that the Bureau's initial loss function analysis had significantly overstated the distributive accuracy of the adjusted figures at the state and local levels, where the census is actually used for apportionment and funding. See Pet. App. 141. The Secretary pointed out that the original loss function analysis appeared seriously to underestimate the variances, or estimates of sampling error, in the adjusted data. *Id.* at 190-191. The Undercount Steering Committee (a panel of nine senior Census Bureau officials, see J.A. 71) had reported that the actual variances were between 1.7 and 3 times as great as the estimates used in conducting the loss function analysis. Pet. App. 190-191.[13] The Secretary concluded that if the variances were increased by a factor of 2, a figure at the low end of the Bureau's range, "the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy." *Id.* at 191; see *id.* at 74. The record further showed that, even before that variance correction, an adjustment was estimated to worsen the distributive accuracy of 11 of the 23 metropolitan areas in

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ing the proposed adjusted figures and attempting to correct them for various "biases" or errors. See *id.* at 186-187. The census and the adjusted counts were then compared to the estimated "true population."

[13] The Undercount Steering Committee expressed that conclusion in an Addendum issued on June 27, 1991—less than three weeks before the Secretary was required by the stipulation to announce his decision for or against adjustment. See Pet. App. 190.

cities with 500,000 or more inhabitants, including the City of New York. *Id.* at 191.[14]

4. The Secretary also emphasized that even very small changes in the assumptions utilized in developing the adjustment methodology would shift Representatives from State to State. For example, "[o]ne expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods." Pet. App. 142; see also *id.* at 218. The Secretary noted as well the gravity of departing from the 200-year practice of relying upon unadjusted figures to apportion Representatives among the States. *Id.* at 138; see also *id.* at 248. Finally, the Secretary pointed out that "[d]ecisions that may be nearly equally defensible from a technical

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[14] Moreover, although the adjustment was in large part proposed to remedy the disproportionate undercount of minorities, the Secretary explained that the driving force of the proposed adjustment may not have been the undercount at all. He noted that "[o]ne would hope that the predominant determinant of the adjustment would be the number of people missed in the census," so that "areas with high miss rates get high adjustments." Pet. App. 173. His evaluation revealed, however, that the areas with the three highest omission rates in fact had very different adjustment rates. To a large extent, it turned out, the adjustment outcome reflected attempts to correct for *over*counting in certain areas and certain respects. *Ibid.* The Secretary's decision also suggested the lack of a firm basis for finding a direct correlation between a State's percentage of minority residents and how it fares under an adjustment, noting that the undercount rate for Montana was higher than that of New York. See *id.* at 194. Indeed, despite its relatively large proportion of minorities (see Bureau of the Census, Department of Commerce, *State and Metropolitan Area Data Book 1991*, at XIV-XV (4th ed. 1991)), New York's share of the population would actually decrease as a result of the proposed adjustment. See A.R., App. 10, Table 5.

standpoint may have very different outcomes which can be known in advance of the decisions," thereby creating the danger of actual or perceived "manipulation of the census for partisan gain." *Id.* at 236-237.

5. If Secretary Mosbacher had authorized the particular adjustment proposed for his consideration in July 1991,[15] and those adjusted figures had been made the basis for a reapportionment of Representatives among the States, the result would have been a loss of one Representative each for Wisconsin and Pennsylvania and a gain of one Representative each for California and Arizona. See Pet. App. 17, 250-251. Subsequently, however, the Census Bureau determined that its initial estimation of the net undercount had been substantially overstated. See page 4, *supra*. The Bureau then released corrected adjusted figures for each State. See CAPE Report, Att. 4. We have been informed by the Department of Commerce that if the method of equal proportions (see page 3, *supra*) is applied to the corrected adjusted census figures, Wisconsin would lose a Representative and California would gain one (as compared to the current

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[15] Guideline Three required that the adjusted figures be derived through "pre-specified" procedures. See Pet. App. 213-214, 215-217. As the Secretary explained in announcing the guidelines, "[t]his guideline specifie[d] that a set of procedures for generating proposed adjusted counts [would] be determined in advance of receiving the 1990 post-enumeration-survey estimates." 55 Fed. Reg. 9841 (1990). The Secretary's final decision made clear that the pre-specification requirement served as a safeguard against actual or perceived political manipulation, by requiring that choices regarding the details of the adjustment methodology would be made at a time when the effects of those choices upon the various States and localities could not yet be foreseen. See Pet. App. 217; see also *id.* at 83. As a result, although the Secretary recognized the existence of a variety of defensible adjustment methodologies, he was ultimately presented with a choice between the unadjusted census and a single set of adjusted figures.

apportionment), but the number of Representatives allotted to Arizona and Pennsylvania would remain unchanged.[16]

E. The District Court's Decision

Following the Secretary's decision, and over the government's objection, the district court permitted extensive discovery and set the case for trial.[17] The trial

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[16] Although California alone would gain a Representative from the proposed adjustment (as since corrected), California did not appeal from the judgment of the district court sustaining the Secretary's decision not to make an adjustment. See C.A. App. A387-A390 (notice of appeal). Several municipalities and individual voters in California did appeal. We have serious doubts, however, that municipalities have a right (either on their own behalf or in a parens patriae capacity) to challenge the apportionment of Representatives among the States, especially when the State itself is a party. Cf. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923). Similarly, although we may assume that individual residents could be accorded Article III standing to challenge the apportionment of Representatives among the States, there is a question whether they are proper parties to do so, or whether instead the State itself is the proper party to challenge the allocation of political power among the States under the structure prescribed by Article I of the Constitution. Compare *Nebraska* v. *Wyoming*, 115 S. Ct. 1933, 1944-1945 (1995). In *Montana* and *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992), for example, the State itself was a plaintiff (along with individual voters). See *Montana*, 503 U.S. at 458 (referring to "[t]he controversy between Montana and the Government"). Moreover, even if individual residents may initiate an action to challenge the apportionment of Representatives among the States, there is a further question whether they may continue such a challenge when their State, representing the interests of *all* its residents, has chosen to forgo an appeal, and thereby to accept the judgment of the district court that sustained the apportionment.

[17] The government argued in the district court, and continues to believe, that judicial review ought to have been confined to the administrative record that was before the Secretary at the time of his decision against adjustment. See, *e.g.*, *Florida Power & Light Co.* v.

lasted 13 days, involving numerous witnesses and thousands of pages of exhibits. At the conclusion of the trial, the court granted judgment for the governmental defendants, using the "arbitrary and capricious" standard of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A). See Pet. App. 65-66.[18] The court concluded that the Secretary's consideration of each of the guidelines adopted pursuant to the stipulation was reasonable. In particular, it found that the "Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." *Id.* at 77-78. The district court also explored several of the underlying statistical controversies. Although the court stated in passing that it probably would have ordered an adjustment if it had been called upon to decide the issue de novo (*id.* at 89), it found no basis to set aside the Secretary's determination. The court stated, in particular, that the Secretary "was neither arbitrary nor capricious" in

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Lorion, 470 U.S. 729, 743-744 (1985); *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam); compare *Franklin*, 112 S. Ct. at 2771-2773, 2777-2779; *id.* at 2786 & n.22 (Stevens, J., concurring in part and concurring in the judgment). In our view, however, the evidence at trial confirmed the reasonableness of the Secretary's decision.

[18] At a prior stage of the litigation, the district court had concluded that "Article I, § 2 requires that the census be as accurate as practicable." Pet. App. 109 (brackets and internal quotation marks omitted). The court adhered to that conclusion in its final ruling, while making clear that its application of that standard would reflect deference to the Secretary's resolution of disputed technical and policy questions. See *id.* at 68 (test is "whether the Secretary's decision was arbitrary and capricious in light of the requirement that the decision provide the most accurate census practicable").

concluding that the superior distributive accuracy of the adjusted figures had not been established. *Id.* at 77.

F. The Court Of Appeals' Decision

On appeal to the Second Circuit, respondents did not contest the district court's determination that the Secretary's decision against adjustment was not arbitrary or capricious. They argued instead that the district court should have analyzed the adjustment issue de novo because the outcome of the decision affected the allocation of Representatives and thus raised constitutional concerns. The court of appeals rejected the argument for de novo review. Pet. App. 23, 34. It nevertheless reversed the judgment of the district court, on a rationale not advanced by respondents. It held that "both the nature of the right and the nature of the affected classes are factors that traditionally require that the government's action be given heightened scrutiny: the right to have one's vote counted equally is fundamental and constitutionally protected, and the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups." *Id.* at 33. The court noted that in "one person-one vote" challenges to intrastate districting plans, a court must first determine "whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Id.* at 36-37 (quoting *Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983)). In that setting, if a court determines that a good-faith effort has not been made, "the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Id.* at 37 (quoting *Karcher*, 462 U.S. at 731).

Applying that analysis here, the court of appeals concluded that "plaintiffs carried their burden of proving

that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable." Pet. App. 38. The court reached that conclusion by focusing on "the Secretary's acknowledgement" that use of the adjusted population estimates likely would increase the overall *numeric* accuracy of the census at the national level and would reduce the disproportionate undercount of minorities. *Ibid.* The court stated that the Secretary "gave other factors priority over achievement of greater accuracy" at the national level by, *inter alia*, "valu[ing] 'distributive accuracy' over numerical accuracy." *Ibid.* It also expressed the view that the Secretary's determination that an adjustment should not be made unless it would result in *greater* distributive accuracy implied that he did not make the requisite good-faith effort in light of the improved count of the total national population and the improved absolute count of minorities under the adjusted figures. *Ibid.*; see also *id.* at 38-39.[19] The court of appeals concluded that the Secretary's decision against adjustment was "subject to scrutiny not under an arbitrary-and-capricious standard of review but rather under the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity." *Id.* at 39-40. It therefore vacated the judgment of the district court and remanded for further proceedings to determine whether the Secretary's deci-

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[19] The court of appeals also noted the Secretary's concern that an adjustment that did not clearly provide a more accurate account of the distribution of the population would introduce fears of political manipulation. The court stated that that concern reflected a belief that "eliminating the possibility of manipulation of statistical surveys in the future was more important than using the admittedly unmanipulated 1990 PES to achieve a more accurate overall count." Pet. App. 38.

sion "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." *Id.* at 40.

Judge Timbers dissented. He expressed agreement with the decision and reasoning of the district court and noted that the majority's holding was in conflict with the decisions of two other courts of appeals. Pet. App. 40 (citing *City of Detroit* v. *Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994); *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992)).

SUMMARY OF ARGUMENT

A. In light of the Census Bureau's extraordinary efforts to conduct an accurate enumeration, and its success in counting 98.4% of the population, respondents bear a heavy burden in contending that the Constitution mandated a statistical adjustment to the 1990 census figures. In fact, the Secretary's decision against adjustment was fully consistent with applicable constitutional requirements. The Secretary's emphasis on distributive rather than numeric accuracy, and his determination that the unadjusted figures would be considered the most accurate absent a contrary showing, were "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777 (1992). The focus on distributive accuracy follows necessarily from the constitutional purpose of the census, which is to determine the apportionment of Representatives among the States. And it was surely permissible for the Secretary to require proof that the adjusted population estimates were more accurate before abandoning the 200-year practice of using unadjusted figures.

Based on an exhaustive analysis, the Secretary concluded that the available evidence "tends to support the superior distributive accuracy of the actual enumeration." Pet. App. 185. Any review of the Secretary's analysis of disputed technical issues must be conducted under a highly deferential standard. The adjustment process involved a host of complex assumptions that were susceptible to error, and the use of plausible alternative assumptions would have affected the apportionment of seats in the House of Representatives. Absent unequivocal evidence that an adjustment would have improved the distributive accuracy of the census, there is no constitutional basis upon which a court could set aside the Secretary's determination that no adjustment was warranted.

B. The district court held that the Secretary "was neither arbitrary nor capricious" in concluding that the superior accuracy of the adjusted figures had not been demonstrated, Pet. App. 77, and respondents did not challenge that holding on appeal. The court of appeals concluded, however, that the Secretary's adjustment decision was subject to review under a heightened standard adapted from this Court's intrastate redistricting decisions. The court reasoned, in particular, that "plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable." *Id.* at 38. That statement is without basis. The Secretary's acknowledgment that an adjustment would have increased *numeric* accuracy does not evidence a lack of effort to apportion Representatives accurately among the States, since only distributive accuracy is relevant to the apportionment process. Nor did the district court find, implicitly or explicitly, that a good-faith effort had not been made.

The court of appeals also erred in suggesting that equal protection principles required heightened scrutiny of the Secretary's decision because the census disproportionately undercounted racial minorities. It is well established that an equal protection violation based upon racial discrimination requires proof of a discriminatory *purpose*. Respondents have not alleged, and neither the court of appeals nor the district court found, that either the Secretary or other federal officials acted for the purpose of reducing the electoral power of (or otherwise disadvantaging) minority residents. Accordingly, review of the Secretary's decision under a heightened standard is not warranted.

ARGUMENT

THE SECRETARY'S DECISION NOT TO UNDERTAKE A STATISTICAL ADJUSTMENT OF THE 1990 CENSUS WAS FULLY CONSISTENT WITH THE CONSTITUTION

In considering whether to make a statistical adjustment of the population figures resulting from the 1990 census, the Secretary of Commerce received sharply conflicting recommendations from independent advisors and from subordinates within his own Department. The question for this Court is not whether, on balance, the Secretary made the appropriate determination as a matter of statistics or policy, but whether his decision not to make an adjustment was within the range of constitutionally permissible options. As we demonstrate below, it was.

Resolution of the technical and policy disputes bearing on the adjustment determination is substantially entrusted to the Secretary's expert judgment and discretion, and judicial review must reflect appropriate deference to his decision. Such deference is mandated by generally applicable principles of administrative law. It is required

as well by the broad delegation of authority expressed in the Constitution itself, which provides that the census shall be conducted "in such Manner as [Congress] shall by Law direct," Art. I, § 2, Cl. 3, and in the Census Act, which authorizes the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. 141(a). And it is required by the compelling interest in the finality of the President's apportionment of Representatives among the States in January 1991, which was based on the unadjusted census data.

Secretary Mosbacher's July 15, 1991, decision against adjustment of the 1990 census figures was reasonable and consistent with applicable constitutional standards. We agree with the court of appeals that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census. See Pet. App. 23-25; 13 U.S.C. 141 (decennial census), 181 (intercensal population data). The remainder of the court of appeals' analysis, however, reflects a fundamental misunderstanding both of the bases for the Secretary's decision and of the governing constitutional principles.

A. The Secretary's Decision Was Consistent With The Text, History, And Purpose Of The Constitution

1. The Census Clause of the Constitution provides that the "actual Enumeration" of the population shall be conducted "in such Manner as [Congress] shall by Law direct." Art. I, § 2, Cl. 3. That text affords Congress great discretion to choose from among the broad range of possible ways to conduct the census the particular "Manner" it believes to be the most appropriate. Congress in the Census Act has delegated to the Secretry broad authority to assess and weigh myriad factors, such as feasibility, efficiency, resource allocation, public partici-

pation, state and local support, various standards of accuracy, and the degree of confidence in the results. In particular, nothing in the Census Clause prescribes whether (or to what extent) Congress or the Secretary should provide for face-to-face interviews, mailed questionnaires, follow-up visits, or statistical sampling, so long as the process is reasonably calculated to produce state population totals having a sufficient degree of accuracy to constitute an "actual Enumeration" on which to base an apportionment of Representatives among the several States "according to their respective Numbers," Art. I, § 2, Cl. 3. Compare *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 463 (1992) ("The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course.").

There can be no doubt that the manner in which the Census Bureau conducted the 1990 decennial census satisfied that fundamental standard. The Census Bureau first sought to identify every housing unit in the country and then mailed or delivered a questionnaire to every unit. See Pet. App. 323-324. "The Census Bureau followed up every housing unit for which a questionnaire was not returned," *id.* at 327; its nonresponse follow-up policy required Bureau enumerators "to make up to six attempts to contact a household member and complete a census questionnaire," *id.* at 328. The Bureau also developed special procedures directed at individuals—such as residents of group quarters, transients, military personnel, homeless persons found at street and shelter locations, and parolees and probationers—who the Census Bureau believed were particularly likely to be missed. See *id.* at 326, 330-331. The Bureau's "Were You Counted?" campaign provided individuals who believed that they had been missed with an additional opportunity for

inclusion in the census. *Id.* at 330. Finally, units of local government were permitted to challenge the housing unit or group quarters count for any block. *Id.* at 332.[20] The Census Bureau has concluded that that elaborate process counted 98.4% of the nation's population, which was roughly equal to the percentage counted in 1980 and exceeded the percentage counted in every census before 1980. See CAPE Report 4.

Especially when measured against historical practice and experience, the "headcount" in 1990 was well within the range of accuracy necessary to fulfill Congress's constitutional responsibility to make an actual enumeration of the population. Compare *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777-2778 (1992) (noting importance of historical experience); *id.* at 2785 (Stevens, J., concurring in part and concurring in the judgment) ("The 'usual residence' policy that has guided the census since 1790 provides a further standard by which to evaluate the Secretary's exercise of discretion."); *Montana*, 503 U.S. at 465-466. Respondents accordingly assume a heavy burden in attempting to demonstrate that the Census Clause nevertheless imposed a judicially enforceable duty on the Secretary to *revise* that constitutionally acceptable enumeration—*e.g.*, by means of a statistical adjustment. Respondents have wholly failed to carry that burden.

2. The Secretary's decision not to undertake an adjustment of the 1990 census figures rested primarily on three determinations. First, the Secretary concluded that distributive rather than total numeric a curacy should be of paramount importance in his decision whether to make a

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[20] Each of the country's 51 largest cities challenged at least some blocks, and eight cities challenged more than 2000 blocks. Pet. App. 332.

statistical adjustment. Second, the Secretary determined that, in making his decision, the unadjusted census figures would "be considered the most accurate count of the population of the United States, at the national, State, and local level, unless an adjusted count is shown to be more accurate." Pet. App. 151. Finally, the Secretary concluded that the adjusted figures had not been shown to improve distributive accuracy and that adjustment was therefore not warranted.[21]

The first two determinations are matters of policy that a court may review to the extent of determining whether they are "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S. Ct. at 2777. The third is an exercise of technical judgment that is properly reviewable, if at all, only under a deferential "rational basis" or "arbitrary and capricious" standard.[22] Each of the determinations at issue easily withstands judicial scrutiny.

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[21] Pursuant to the stipulation and guidelines, see page 6, *supra*, the Secretary's 1991 decision also discussed in detail several other factors bearing on the decision not to adjust. We believe that the Secretary's consideration of those factors was "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 112 S. Ct. at 2778. However, disputes concerning the propriety of those aspects of the Secretary's decision are not central to this case for present purposes. Although the Secretary believed that such factors as encouraging participation in future censuses and the fear of actual or perceived political manipulation lent further support to the decision against adjustment, he stated unequivocally that the adjusted figures had not been shown to improve the accuracy of the census in the relevant (*i.e.*, distributive) sense. Moreover, such factors as concern about actual or perceived political manipulation are not irrelevant to the overall, long-term accuracy of the census. Cf. *Baldrige* v. *Shapiro*, 455 U.S. 345, 353-354 & n.8, 361 & n.17 (1982).

[22] Two courts of appeals have concluded, in rejecting constitutional challenges to the Secretary's decision against adjustment,

a. The constitutional purpose of the census is to determine the apportionment of Representatives among the States, U.S. Const. Art. I, § 2, Cl. 3, based on their "respective numbers, counting the whole number of persons in each State." Amend. XIV, § 2.[23] Even a

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that the Apportionment Clause "does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology" because such a lawsuit "invokes no judicially administrable standards." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992); accord *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1375-1378 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994). We shall assume for present purposes, however, that the Secretary's decision is reviewable under a "rational basis" or "arbitrary and capricious" standard. Cf. *Franklin*, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment).

[23] As explained above, see pages 18-19, *supra*, use of the particular adjustment proposed for Secretary Mosbacher's consideration would have resulted in a loss of one Representative each for Wisconsin and Pennsylvania and a gain of one each for California and Arizona, while use of the "corrected" adjusted figures would have resulted in a transfer of one Representative from Wisconsin to California. The large majority of the plaintiffs in this case, however, are States other than California and Arizona, or municipalities or residents outside of California and Arizona. Although many of those plaintiffs may have suffered injury-in-fact due to the impact of the Secretary's decision upon the distribution of federal funds, cf. *City of Detroit*, 4 F.3d at 1374-1375, there is a substantial question whether plaintiffs outside Arizona and California may contest the allocation of Representatives among the States or invoke a heightened standard of review based upon the purported effect of the Secretary's decision upon the right to vote. See *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720 (1990) ("Ordinarily, of course, a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (internal quotation marks omitted); cf. *Franklin*, 112 S. Ct. at 2776 (plurality opinion) (Massachusetts lacked standing to challenge accuracy of census data absent allegation that it would have been allocated an additional Representative if different data had been used). Nor does the Administrative Procedure Act fur-

dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined. Cf. *Karcher* v. *Daggett*, 462 U.S. 725, 736 (1983) ("the existence of a one-percent undercount would be irrelevant to population deviations among districts if the undercount were distributed evenly among districts"). Conversely, a precise determination of the nation's total population as a result of a statistical adjustment would not improve the apportionment process if the States' respective shares were inaccurately estimated under the adjustment. Thus, the Secretary's focus on distributive rather than numeric accuracy was "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S. Ct. at 2777; accord Pet. App. 77-78 (district court's decision). Respondents acknowledge (Br. in Opp. 39) that "distributive accuracy is the object of adjustment." See also Resp. C.A. Reply Br. 14 n.4 (stating that respondents "agree (as do, for that matter, all experts on either side of the adjustment question) that it is distributive accuracy that is of paramount importance for the constitutional and legal purposes for which the census is conducted").

b. The Secretary's determination to resolve the issue of an adjustment to the 1990 census by regarding the unadjusted figures as the most accurate unless a contrary showing was made is also a judgment "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 112 S. Ct. at 2778. Because unadjusted headcounts had been used for 200 years, the Constitution surely did not bar the Secretary from adopting a working hypothesis that unadjusted figures

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nish a statutory basis for challenging the decennial census. *Franklin*, 112 S. Ct. at 2773-2776.

derived from the 1990 census would be treated as the most accurate unless alternative numbers were shown to be better. See pages 28-29, *supra*. Nor could "the constitutional goal of equal representation" among the States, *Franklin*, 112 S. Ct. at 2777, plausibly be thought to require the Secretary to use adjusted figures that he had not found to be more accurate than the unadjusted numbers in achieving that goal. In any event, the Secretary did not simply determine that proponents of adjustment had failed to prove the greater distributive accuracy of adjusted figures; he affirmatively concluded that "the evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration." Pet. App. 185.[24]

c. As Census Bureau Director Bryant observed in her recommendation to the Secretary in favor of an

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[24] The court of appeals suggested in passing that the Secretary regarded the adjusted and unadjusted numbers as equally accurate, see Pet. App. 38, and stated that the adjusted figures would improve accuracy for the areas in which up to two-thirds of the population resided, see *id.* at 39. Those characterizations of the record reflect a basic misreading of the Secretary's decision and the evidence at trial. The two-thirds figure was an *original* estimate provided by the Census Bureau using its "loss function model." The Secretary's decision explained in considerable detail that the loss function model had failed to take into account variances that the Undercount Steering Committee subsequently reported to be significantly understated. See *id.* at 185-192. As the district court explained, "when the Secretary employed a statistical variance toward the low end of the acceptable range envisioned by the [Undercount Steering Committee], he found that the proportional shares of 28 or 29 states would be worsened by adjustment." *Id.* at 74. As noted above, subsequent research by the Census Bureau and further evidence presented at trial demonstrated that the original loss function analysis substantially overstated the accuracy of the adjusted data. See page 16, *supra*. The court of appeals' reliance on data that the Secretary had specifically corrected underscores the error of its analysis.

adjustment, "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." J.A. 73. The Secretary engaged in exhaustive analysis of the pertinent evidence, however, and his resolution of disputed technical questions can be reviewed only under an extremely deferential standard. See page 29 and note 22, *supra*. There is, in particular, no basis for respondents' contention in the court of appeals that the central statistical issue in this case—whether use of the adjusted figures would have improved the distributive accuracy of the census—should have been resolved by the district court de novo on the ground that the case involves a constitutional claim.

De novo review of the expert agency's technical judgments would be especially inappropriate in the present context, where the pertinent constitutional and statutory provisions vest broad discretion in the political Branches. See *Baldrige* v. *Shapiro*, 455 U.S. 345, 361 (1982). The Census Clause provides that the census shall be conducted "in such Manner as [Congress] shall by Law direct." Art. I, § 2, Cl. 3. The Census Act similarly contains a broad delegation of authority to the Executive Branch, directing the Secretary to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a). The governing constitutional and statutory provisions therefore counsel the courts to exercise particular caution in reviewing the Secretary's discretionary determinations regarding the conduct of the census.

Moreover, although issues pertaining to the accuracy of the census implicate constitutional values, resolution of the statistical dispute in this case does not involve the interpretation of constitutional text. Rather, it involves an exercise of technical expertise that lies uniquely within the competence of the Executive Branch officials to

whom Congress has entrusted the extraordinarily complex task of conducting the decennial census. As this Court has repeatedly recognized, where "analysis of the relevant documents requires a high level of technical expertise, [courts] must defer to the informed discretion of the responsible federal agencies." *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 377-378 (1989) (internal quotation marks omitted); see also *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2387 (1994); *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976); *International Fabricare Institute* v. *EPA*, 972 F.2d 384, 400 (D.C. Cir. 1992) ("As we are not scientists and must defer to the Agency's judgments on matters within its technical competence, our task is to assure that they be reasoned, not that they be right."). That respondents' attack on the Secretary's decision is framed as a constitutional challenge does not detract from the respect for institutional competence that underlies the rule of deference to an expert agency's technical judgments.

Finally, de novo resolution by the district courts of the question whether an adjustment would increase distributive accuracy would create the possibility of inconsistent factual findings by courts in different jurisdictions —each reviewable on appeal only under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-576 (1985). Where a variety of reasonable alternatives were presented for the Secretary's consideration,[25] no definitive resolution of the conflict

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[25] As explained above, see note 15, *supra*, the Secretary was ultimately confronted, due to the pre-specification requirement, with a choice between the unadjusted census and a single set of adjusted

would be possible under ordinary principles of appellate review. And because the constitutional purpose of the census is to determine the manner in which a fixed number of Representatives should be apportioned among the States, the Secretary could not utilize adjusted figures in some regions of the country and unadjusted figures in others. See *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1378 (6th Cir. 1993) ("Plaintiffs' request for a statistical adjustment for Michigan alone cannot be considered in isolation. It would be impractical for this Court to order ([and] the Secretary to do) such an adjustment without considering the consequences for the other states and other cities."), cert. denied, 114 S. Ct. 1217 (1994).[35]

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figures. The district court framed the question before it as whether the Secretary had made a permissible choice between those two alternatives, and respondents have not contended that some other set of numbers should have been used. If respondents (or some other plaintiffs) had made such an argument, however, and if the role of the district court were to resolve pertinent statistical disputes de novo, there would be no barrier to courts in different jurisdictions determining that each of several adjustment methodologies would have maximized distributive accuracy.

[35] Nor would it be a satisfactory solution for conflicting district court determinations regarding the choice of census figures that would maximize distributive accuracy to be reviewed de novo by the courts of appeals, and ultimately by this Court. To the institutional limitations applicable to all federal courts would be added the disadvantages associated with requiring appellate judges to function as triers of fact. See *Anderson*, 470 U.S. at 574-575. Those disadvantages are particularly severe where resolution of factual disputes requires credibility determinations. *Id.* at 575. Where (as here) expert testimony is presented on each side of the adjustment question, a court's attempt to determine de novo whether adjustment would enhance distributive accuracy would necessarily involve an assessment of the credibility of the competing experts.

d. The district court held that the Secretary "was neither arbitrary nor capricious" in concluding that the superior distributive accuracy of the adjusted figures had not been demonstrated. Pet. App. 77. That holding was not contested on appeal, and it was clearly correct. As explained above, the formulation and evaluation of the proposed adjustment involved a series of complex processes and assumptions in a highly technical area at the frontier of generally accepted statistical science. In the Secretary's view, however, the analysis tended to show that the adjusted figures were less accurate than the unadjusted count at every level from the state level down. See pages 15-17, *supra*.

There were, moreover, substantial uncertainties in the record that weighed against a determination that the particular adjustment under consideration was distinctly meritorious and superior to the unadjusted figures. Thus, the Secretary noted that "[o]ne expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods." Pet. App. 142; see also *id.* at 218.[27] The evidence at trial confirmed that the use of reasonable alternative assumptions in the

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[27] The Secretary was referring to Dr. Wachter's study, which considered five alternative adjustment calculations. See Pet. App. 142, 218, 303-304. Dr. Wachter compared adjustments using the smoothed adjustment estimates with the raw estimates. *Id.* at 218. Recognizing the problems inherent in the imputation of persons who could not be matched with census data, Dr. Wachter also substituted two alternative assumptions for dealing with unmatched persons. *Ibid.* Dr. Wachter's fifth estimate employed adjustment factors formulated on the basis of data within each State rather than the multi-State aggregations used in the post-strata. *Ibid.* Each alternative approach produced a different apportionment result. *Id.* at 142, 218, 304.

adjustment process could have altered the apportionment of Representatives. For example, both plaintiffs' and defendants' experts recognized that alternative geographic groupings could have been used in formulating post-strata and that those alternatives would have produced different adjusted population figures. See pages 7-8, *supra*. Moreover, experts on both sides recognized that the decision to "pre-smooth" the variances, and then to "smooth" the adjustment factors, significantly affected the adjustment outcome. See pages 9-11, *supra*.[28]

The uncertainties discussed at length in the Secretary's decision were underscored by the trial testimony of Dr. Robert Fay, a Senior Mathematical Statistician at the Census Bureau and one of the members of the Undercount Steering Committee who had initially supported adjustment. Dr. Fay testified that there had been a great deal of uncertainty at the time of the July 15, 1991, decision surrounding the original estimated variances used in the loss function model. Because of that uncertainty, Dr. Fay, on behalf of the Undercount Steering Committee, attempted to estimate the size of the variances based on judgment, not calculations. Tr. 1906.

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[28] Dr. David Freedman, defendants' smoothing expert, testified that the dramatic effects of smoothing militated against an adjustment decision because the assumptions in the smoothing model had not been validated. Tr. 2385-2386. Similarly, Dr. Wachter stated that the substantial effects of pre-smoothing were especially troubling because "[p]re-smoothing the variances that go into smoothing the adjustment factors is at three removes from the data. It incorporates little, if any, further empirical information. It depends entirely on a set of further assumptions." A.R. 495; see Pet. App. 224. Indeed, because of the serious concerns with the smoothing model, the Census Bureau abandoned the smoothing process altogether in devising a proposal for a possible statistical adjustment for use in the intercensal estimates program. See 58 Fed. Reg. 72-73 (1993).

On that basis, Dr. Fay had "roughly guessed" that there appeared to be enough of a "margin of safety" to support a recommendation in favor of adjustment. Tr. 1907.

After the July 15, 1991, decision, Dr. Fay conducted additional research and determined that the original estimates failed to account for all the sources of variance in the smoothing model. When those previously unaccounted-for variances were taken into account, Dr. Fay determined that the initial variance estimates were understated by approximately a factor of 2. Tr. 1914-1917.[28] That result, Dr. Fay explained, represents a significant increase in the uncertainty of the PES estimates. Tr. 1920. As a result of this work, Dr. Fay no longer advocated the adjustment recommended by the Committee and sought by respondents. Tr. 1920-1921.

In sum, the adjustment process and the loss function analysis designed to evaluate that process were based on technical assumptions and hypotheses that were subject to substantial uncertainty. The record demonstrated that had several of those assumptions been altered in a manner that would itself have been reasonable, the apportionment of Representatives would have been different from the one resulting from the particular adjustment submitted to the Secretary. For that reason, and in the absence of evidence demonstrating that even that particular adjustment proposal would have improved the distributive accuracy of the census, the Secretary's decision not to undertake the adjustment was clearly permitted under the Constitution. That is especially so in light of the need for the Secretary to make a decision by July 15, 1991, the deadline to which respondents stipulated in the district court and which

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[28] Two of plaintiffs' experts, Dr. Wolter and Dr. Tukey, testified that such results would have caused them to review their recommendations. Tr. 726-727, 1420.

they did not challenge in the court of appeals. As that deadline approached, the Secretary concluded that the state of the administrative record and the various expert evaluations of it were not yet sufficiently settled to permit him to make a decision in favor of adjustment with the degree of confidence he believed was appropriate for such a significant departure from historical practice. See Pet. App. 140-141, 144.

B. The Court Of Appeals Erred In Holding That The Secretary's Decision Should Be Subject To Heightened Scrutiny And That Respondents Established A Prima Facie Case Of A Constitutional Violation

The court of appeals analogized the Secretary's 1991 decision to a State's decision to create congressional or state legislative districts of unequal size. Under this Court's precedents, parties challenging a State's districting decisions first bear the burden of proving that differences between the populations of individual districts within a State are "not the product of a good-faith effort to achieve population equality." *Karcher*, 462 U.S. at 740; see *id.* at 730-731 (discussing burden of proof). If the plaintiffs are able to make that showing, "the burden shift[s] to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." *Id.* at 740.

In the present case, the court of appeals concluded that "plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable," and that "the burden thus shifted to the Secretary to justify his decision not to adjust the census in a way that the [district] court found would for most purposes be more accurate and would lessen the disproportionate counting of minorities." Pet. App. 39.

The court of appeals thus treated the Secretary's decision as suspect on the basis of (a) the Secretary's acknowledgment that an adjustment would probably improve total numeric accuracy at the national level, (b) a purported district court finding that the adjusted figures "would for most purposes be more accurate," *ibid.*, and (c) the uncontested fact that the undercount of racial minorities was greater than the undercount of nonminority residents. The court of appeals' attempt to apply the *Karcher* analysis in this quite different setting does not withstand scrutiny.[30]

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[30] Any effort to apply a *Karcher*-type analysis to the Executive Branch's conduct of the census and certification of state population figures would have to take account of certain significant differences between the census and apportionment process and a State's districting decisions. First, an attempt to ensure that congressional districts in different States are precisely equal in population "is constrained by three requirements. The number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines." *Montana*, 503 U.S. at 447-448. Thus, notwithstanding the federal government's efforts to achieve population equality "as nearly as is practicable," *Karcher*, 462 U.S. at 730, disparities between districts in different States are likely to be of a magnitude that would be unacceptable in the context of state districting policy. Second, because of the technical complexity of the enumeration process and the multitude of discretionary determinations that it entails, a reviewing court should be especially cognizant of the difference between the question whether the agency has in fact maximized population equality and the question whether it has made a *good-faith effort* to do so. See pages 44-45, *infra*. Finally, the sweeping constitutional grant of authority to Congress to conduct the census "in such manner as they shall by Law direct," Art. I, § 2, Cl. 3, suggests that a broader range of legitimate governmental objectives may be available to justify use of census figures that do not maximize population equality than would be true of decisions made in the state districting context.

1. As an initial matter, the extraordinary effort expended by the Census Bureau in conducting the 1990 decennial census, and the success of the Bureau in counting 98.4% of the nation's population, are sufficient in themselves to refute any suggestion that the headcount totals respondents challenge were "not the product of a good-faith effort to achieve population equality." *Karcher*, 462 U.S. at 740. As we have explained above (see pages 27-28, *supra*), the headcount was well within the range of accuracy necessary to fulfill Congress's constitutional responsibility to make an actual enumeration of the population for apportionment purposes. For that reason alone, even if we assume *arguendo* that the *Karcher* framework should be applied by analogy here, respondents have failed to carry their threshold burden under that framework.

2. In the state redistricting cases, where a given population is to be divided into a fixed number of districts, courts can readily "decree equality." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992). In that setting, if significant differences between the sizes of individual districts are conceded to exist, a court can confidently conclude, not simply that the State has failed to achieve population equality, but that it has failed to make a good-faith effort to do so.

This case, by contrast, involves the antecedent task of determining the population, a complex inquiry circumscribed by limitations in resources and statistical science. That task involves numerous technical and policy decisions as to which reasonable alternatives are available.[31]

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[31] Each choice among such alternatives would in turn invite litigation under the court of appeals' decision. In addition to the several lawsuits seeking to compel a statistical adjustment to the census,

numerous suits have been filed challenging a host of other census-related decisions. See, *e.g.*, *Franklin* v. *Massachusetts*, *supra* (challenging Census Bureau's method of allocating certain overseas federal employees to particular States); *National Law Center on Homelessness and Poverty* v. *Brown*, appeal pending, No. 94-5312 (D.C. Cir.) (argued Oct. 6, 1995) (challenging Census Bureau's procedures for locating and enumerating homeless persons); *Carey* v. *Klutznick*, 637 F.2d 834 (2d Cir. 1980) (seeking, in addition to a statistical adjustment to 1980 census, an order requiring the Census Bureau to process certain forms and to compare Census Bureau records of New York City residents with a computerized list of 1.2 million persons in New York City eligible for Medicaid); *Borough of Bethel Park* v. *Stans*, 449 F.2d 575 (3d Cir. 1971) (challenging manner in which Census Bureau determined residence of college students, persons confined to institutions, federal personnel and their dependents located outside the United States, and other citizens studying or working outside the United States who are not federal employees); *District of Columbia* v. *United States Dep't of Commerce*, 789 F. Supp. 1179 (D.D.C. 1992) (challenging Census Bureau's decision to count as residents of Virginia inmates of Lorton Correctional Facility, which is located in Virginia, but operated by the District of Columbia), appeal voluntarily dismissed, No. 92-5212 (D.C. Cir.); *Ridge* v. *Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989) (challenging inclusion of illegal aliens in 1990 census); *City of Willacoochee* v. *Baldrige*, 556 F. Supp. 551 (S.D. Ga. 1983) (challenging accuracy of population count of Georgia city); *Carey* v. *Klutznick*, 503 F. Supp. 874 (N.D. Ill. 1980) (suit to require Census Bureau to keep its offices in Cook County, Illinois, open and to continue the 1980 census to ensure that all housing units in Cook County were canvassed); *City of Philadelphia* v. *Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980) (challenging, among other things, Census Bureau's alleged hiring of unskilled enumerators and its failure to properly conduct local review); *Federation for American Immigration Reform* v. *Klutznick*, 486 F. Supp. 564 (D.D.C.) (three-judge court) (challenging inclusion of illegal aliens in 1980 census), appeal dismissed, 447 U.S. 916 (1980); *City of Camden* v. *Plotkin*, 466 F. Supp. 44 (D.N.J. 1978) (challenging manner in which Census Bureau conducted its 1976 "Pretest Census"); *West End Neighborhood Corp.* v. *Stans*, 312 F. Supp. 1066 (D.D.C. 1970) (challenging Census Bureau's decision to replace door-to-door method of

Karcher itself recognized the distinction between the determination of population by the decennial census, in which an undercount is to be expected, and the apportionment of seats in a state legislature based on the census totals, in which mathematical exactitude is achievable. See 462 U.S. at 731, 735-738. A reviewing court's belief that alternative measures would more likely than not have increased the distributive accuracy of the census scarcely suggests that the Secretary has failed to make a *good-faith effort* to achieve a fair apportionment. The Constitution allows for varying approaches to the conduct of the census and varying measures of accuracy and equity. In light of the Constitution's plenary grants of authority to Congress in the Apportionment Clause, the Necessary and Proper Clause, and Section 5 of the Fourteenth Amendment, the Secretary's "apparently good-faith choice of a method" for conducting the census (pursuant to broad discretionary authority conferred on him by Congress) "commands far more deference than a state districting decision." *Montana*, 503 U.S. at 464.

3. Even under the court of appeals' analysis, a necessary predicate for concluding that the Secretary had failed to make "a good-faith effort to achieve population equality" in this setting, *Karcher*, 462 U.S. at 740, would be that the Secretary had determined that the proposed adjustment would increase the accuracy of the States' "respective Numbers" (*i.e.*, *distributive* accuracy), but had nevertheless declined to make an adjustment. Only then could the burden shift to the government to show that the decision against adjustment was "necessary to achieve some legitimate [federal] objective." *Ibid.* The court of appeals simply erred, however, in inferring the lack of a

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enumeration with mail-out/mail-back procedure); *Quon* v. *Stans*, 309 F. Supp. 604 (N.D. Cal. 1970) (same).

good-faith effort to achieve population equality from the Secretary's acknowledgment that an adjustment would likely increase *numeric* accuracy at the national level. As discussed above (see pages 30-31, *supra*), the Secretary's focus on distributive rather than numeric accuracy was fully justified. The court of appeals did not explain how the goal of equal representation for equal numbers of people in the several States could be better served by focusing on the total *numeric* accuracy of the census figures at the national level. As the district court recognized, "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." Pet. App. 77-78. See also Br. in Opp. 39 (acknowledging that "distributive accuracy is the object of adjustment").

4. The district court did not purport to issue formal findings regarding the relative accuracy of the adjusted and unadjusted census figures. The court's treatment of the issue was somewhat enigmatic. On the one hand, the court stated (without significant explanation) that it was "satisfied that for most purposes the PES resulted in a more accurate—or to be statistically fashionable, a less inaccurate—count than the original census," Pet. App. 59, and it further observed that "were this Court called upon to decide this issue *de novo*, I would probably have ordered the adjustment," *id.* at 89. On the other hand, the court stated that "plaintiffs' failure to illustrate affirmatively the superior accuracy of the adjusted counts either (1) at any level mentioned in Guideline One, or (2) for any reasonable definition of accuracy, is sufficient to support a finding that Guideline One favors use of the original census counts." *Id.* at 78.

In any event, the district court clearly did *not* find that the Secretary had failed to make a *good-faith effort* to maximize distributive accuracy. A determination that the Secretary's stated conclusions were arbitrary or unreasonable conceivably could have suggested the lack of such an effort, cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-819 (1982) (official's entitlement to "good faith" immunity is determined by reference to the objective reasonableness of the challenged conduct); but the district court held that the Secretary was "neither arbitrary nor capricious" in concluding that the superior distributive accuracy of the adjusted numbers had not been established. Pet. App. 77. There is consequently no basis for the court of appeals' assertion (*id.* at 38) that "the findings of the district court * * * plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable."

5. The court of appeals also referred repeatedly to the disproportionate undercount of racial minorities (see, *e.g.*, Pet. App. 33, 38, 39, 40), invoking that differential to support the proposition that the Secretary's decision not to adjust should be reviewed "under the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity." *Id.* at 39-40. The court of appeals was simply wrong, however, in its belief that "[e]qual protection analysis requires that heightened scrutiny be given to the Secretary's decision to adhere to an acknowledged undercount that concededly impacts minority groups more severely than nonminority groups." *Id.* at 34. To the contrary, establishment of an equal protection violation based upon racial discrimination requires proof of a discriminatory *purpose*. *Washington* v. *Davis*, 426 U.S. 229, 239-245 (1976). The intentional undercounting of

racial minorities in the conduct of the census would be a matter of grave concern to the integrity of our democratic process. The courts would be open to consider such claims under the analytical framework followed in *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and its progeny, and to afford relief where appropriate, see *Franklin*, 112 S. Ct. at 2776-2777 (opinion of O'Connor, J.).

Respondents have not contended, however, and neither the court of appeals nor the district court found, that either the Secretary or other federal officials acted for the purpose of reducing the electoral power of (or otherwise disadvantaging) minority residents. Indeed, in their briefs in the court of appeals, respondents did not even cite the Fifth Amendment's Due Process Clause, on which an equal protection claim against the federal government must be based. In any event, the evidentiary considerations identified in *Arlington Heights* do not suggest a basis for a claim of racial discrimination in violation of the Fifth Amendment.

The Secretary's decision against adjustment was fully in keeping with historical practice, a fact that suggests a lack of discriminatory intent. Compare *Arlington Heights*, 429 U.S. at 267 & n.16 (abrupt departures from prior policy in ways that disadvantage minorities may constitute evidence of discriminatory motivation); *id.* at 270 (defendant "has applied [its] policy too consistently for [the Court] to infer discriminatory purpose from its application in this case").[32] Secretary Mosbacher's exten-

[32] The Court in *Arlington Heights* also observed that "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." 429 U.S. at 267. In the present case, the Secretary departed from customary procedures only by devoting *enhanced* consideration to the possibility of a statistical adjustment and explaining his ultimate decision in greater detail.

sive explanation published in the *Federal Register* sets out a host of race-neutral reasons for his decision not to adjust. Compare *Arlington Heights*, 429 U.S. at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."). The government's extraordinary efforts to enumerate minority residents[33] and to identify persons who initially failed to return questionnaires (see pages 27-28, *supra*) also belie any inference that Census officials pursued a deliberate policy of undercounting minority residents.

A disparate impact upon racial minorities, though not itself sufficient to establish a constitutional violation, may sometimes furnish evidence of discriminatory purpose. See *Arlington Heights*, 429 U.S. at 265-266; *Davis*, 426 U.S. at 242. In the present case, however, the ultimate effect of the undercount upon minority residents is both indirect and of uncertain magnitude. Those affected by

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[33] In her recommendation to Secretary Mosbacher, Census Bureau Director Bryant stated (J.A. 76):

> For the 1990 census, the Census Bureau mounted the most extensive effort ever to enumerate Blacks and other minorities. This included the hiring of 280 community outreach workers who worked in communities two years before census taking; involvement of 56,000 community organizations—mostly minority but also city and state Complete Count Committees; outstanding cooperation from Black and Spanish language media in running public service announcements and programs about the importance of the census; and the hiring of follow-up enumerators from minority populations, bilingual and multi-language enumerators, and residents of public housing projects and American Indian reservations to enumerate persons in their neighborhoods. Despite this effort, the undercount differential was not reduced below its historical level.

the undercount, it should be emphasized, are not the uncounted individuals themselves; an individual derives no concrete benefit from inclusion in the census, nor does he or she suffer any concrete injury from being left uncounted. Rather, those affected by the undercount include all residents of geographic areas that are assigned less than their true share of the population due to errors in the enumeration process. More precisely for purposes of this case, which involves a constitutional challenge based on the impact of the unadjusted census on the apportionment of Representatives among the States, those affected by the undercount include *all* residents (minority and non-minority, men and women, renters and homeowners) of a State that was assigned less than its "true" share of the total population of the nation and that, as a result, was assigned less than its "true" share of the total number of Representatives.

Respondents assert that "[b]ecause members of minority groups are not evenly distributed geographically, the consequence of the differential undercount is that areas in which members of minority groups are concentrated are systematically deprived of political representation and funding they would otherwise have received." Br. in Opp. 9.[34] Whatever the intuitive plausibility of that theory, however, respondents made no comprehensive effort at trial to demonstrate whether and to what extent States with large minority populations

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[34] As noted above, see page 5, *supra*, the PES also indicated that men, the young, and renters were undercounted at a higher rate than women, older residents, and homeowners. Assuming that members of those groups "are not evenly distributed geographically," it would be equally plausible to hypothesize that areas in which those demographic groups are concentrated would be "systematically deprived of political representation and funding they would otherwise have received."

would as a rule have been credited with a higher share of the country's population if the proposed adjustment had been made, let alone to demonstrate that their shares of the population would have been *more accurately* estimated by use of adjusted figures. See note 14, *supra* (noting that New York State's share of the nation's population would have been reduced by an adjustment). But in addition, respondents have not contended, and the courts below did not find, that the indirect and uncertain impact of the undercount upon the electoral power of minority residents furnished persuasive evidence of discriminatory intent. Absent a showing of intentional discrimination, the differential undercount of minorities at the national level provides no basis for subjecting the Secretary's decision against adjustment to a heightened standard of review.[35]

Respondents also argue that if use of an adjustment would alleviate the racially differential undercount at the national level, then, "*ceteris paribus*, adjustment would improve the *distributive* accuracy of the census." Br. in Opp. 43. The flaw in that argument lies in its premise ("*ceteris paribus*") that other things would remain equal —that the proposed statistical adjustment would lessen the racial disparity without introducing new errors or uncertainties into the enumeration. After extensive consideration of the views of experts on both sides of the adjustment question, the Secretary reached a different conclusion. He noted that he was "deeply troubled by this problem of differential participation and undercount of minorities," but concluded that "an adjustment does not address this phenomenon without adversely affecting the

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[35] Of course, the differential undercount of minority groups (and other demographic groups) may properly be taken into account by Congress or the Secretary in deciding whether to make a statistical adjustment as a matter of policy.

integrity of the census." Pet. App. 139. That determination was based on a reasoned analysis of the pertinent data and of the conflicting recommendations of the Secretary's advisors. Accordingly, even if we assume that a *Karcher*-type analysis applies to the Secretary's decision not to make a statistical adjustment to a census headcount that otherwise fulfills the purposes of the Census Clause, the court of appeals erred in concluding that respondents had carried their threshold burden of showing that the Secretary had failed to make a good-faith effort to maximize population equality.

6. With the issues of *Karcher* and racial discrimination thus put to one side, the only remaining issue is whether the Secretary acted within the range of discretion afforded by the Constitution in declining to make a statistical adjustment. The district court correctly concluded that the Secretary's determination was not arbitrary and capricious. Because respondents have not challenged that conclusion, the judgment of the district court should be affirmed. Now, halfway through the decade governed by the 1990 census, it is time to bring this challenge to that census to a close.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with directions to enter judgment for petitioners.

Respectfully submitted.

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Nos. 94-1614, 94-1631 and 94-1985

Supreme Court, U.S.
FILED
DEC 8 1995
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IN THE

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

STATE OF OKLAHOMA, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

UNITED STATES DEPARTMENT OF COMMERCE, et al.,
Petitioners,

v.

CITY OF NEW YORK, et al., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS

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STATEMENT

In connection with the 1990 decennial census, the Census Bureau conducted a massive, long-planned program to determine the extent to which the census differentially undercounts minorities and to develop statistically adjusted census data to correct that differential undercount. In 1991, after completing its work and reviewing the accuracy of the uncorrected and the corrected census counts, the Bureau concluded that correction would increase the accuracy of the census and that the corrected data should be reported as the 1990 census. The Secretary of Commerce overruled the Bureau and decided instead to use the uncorrected data, even as he acknowledged those data contained a differentially severe undercount of minorities that correction would largely eliminate. Respondents challenged that decision as violative of constitutional guarantees of equal representation.

The district court, after a thirteen-day trial, agreed with respondents that the corrected data had been shown to be more accurate for most purposes. But the court determined that separation of powers concerns required judicial deference to the Secretary's decision, which, in the court's view, could be overturned only if arbitrary and capricious; moreover, the court tested the rationality of that decision only against the Secretary's own guidelines for the adjustment decision and not against the constitutional standard. Because the court found that the guidelines permitted the Secretary to ignore all comparisons of accuracy favoring the adjusted counts if the Secretary could identify any comparison as to which there remained uncertainty, the court ruled in favor of the Secretary. On appeal, the court of appeals rejected the standard of review employed by the district court. The court of appeals accepted the district court's finding that the corrected data were more accurate for most purposes and the uncontested fact that the uncorrected data reflected a differential undercount of minorities that was substantially ameliorated

by the proposed correction. The court of appeals concluded that the Secretary's decision was subject to heightened scrutiny, both because of the nature of the constitutional right impaired and because the decision against correction has a disproportionate impact on a suspect classification (members of minority groups).

Before this Court, petitioners attack the court of appeals' conclusion explicitly and the district court's findings implicitly. At the heart of petitioners' argument lies the claim that the uncorrected census counts are, or at least probably are, as accurate as or more accurate than the corrected counts. To accept that claim means more than just to review and reject the district court's findings of fact. To accept it means to accept as well that the Bureau labored for a decade to find a means of correcting the census; carefully constructed, tested and implemented such a mechanism; reached the conclusion that the mechanism had worked and recommended that the corrected counts were more accurate and should be reported as the 1990 census—and yet that the Bureau was fundamentally mistaken, that the Bureau's correction would have degraded rather than enhanced census accuracy and that only the intervention of the Secretary of Commerce, Robert A. Mosbacher, who disavowed any statistical expertise, saved the census from the Bureau's ill-considered plans. To accept petitioners' argument means, moreover, to accept an approach to defining and deciding questions of accuracy that is without precedent in the history of the United States census, without justification in terms of the constitutional and statutory uses to which census data are put, and without support in logic or law—an approach, indeed, that the United States repudiated before the court of appeals.

Petitioners' account of what the case involves is fundamentally defective, and their discussion of the court of appeals' opinion and the governing law, resting on a flawed foundation, is correspondingly in error. Understanding those

defects and their sources in the Secretary's decision requires, in the first instance, an accurate account of the problem of differential undercount and of how the Bureau addressed its resolution.

A. The Decennial Census

1. Two petitioners—the United States and the State of Wisconsin—refer, variously, to "the 200-year practice of relying upon unadjusted figures to apportion Representatives among the States", U.S. Br. 17; *see also id.* at 23, 31, and to "the 200-year practice of actual enumeration", Wisc. Br. 18, 23-24.[1] Similarly, in his decision against adjustment the Secretary said that adjusting the census would mean "abandon[ing] a two hundred year tradition of how we actually count people." Pet. App. 138. No petitioner has offered any more detailed account of that "practice" or "tradition."

Historically, census-taking in the United States does not reflect the monolithic tradition petitioners suggest. For example, until 1960 most residents were counted through a door-to-door enumeration: Bureau employees travelled across the country, census forms in hand, and recorded information reported to them by census respondents. By 1960, however, the expanding size of the country's population had made door-to-door enumeration prohibitively expensive and time-consuming, and the Bureau had come to recognize that for most respondents the old technique did not secure the most accurate information. The Bureau turned to a mailout and mailback of census questionnaires, and the 1960 census was

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[1] References to the Brief for the Federal Petitioners are given as "U.S. Br."; references to the Brief of Petitioner State of Wisconsin are given as "Wisc. Br."; references to Petitioner Oklahoma's Brief on the Merits are given as "Okla. Br."; references to the joint appendix are given as "Jt. App."; and references given as "Pet. App." are to the appendix to the petition in No. 94-1614.

the first in which the majority of the population was counted through a technique that involved no direct contact between Bureau employees and census respondents.[2] Censuses since 1960 have relied principally on the mailout/mailback of questionnaires, with door-to-door enumeration a second step in the census process.

Acceptance of mailed questionnaires is only the most obvious of the many ways in which the census has grown more sophisticated since 1790. Use of statistical adjustment is another refinement. It is simply untrue that the census data have never been statistically adjusted—in that sense, there is either no "two hundred year tradition of how we actually count people" or "actually count[ing] people" is a more elastic concept than the casual reader might assume. And it is equally untrue that the apportionment of the House of Representatives has never been based upon statistically adjusted census data. There is no "200-year practice of relying upon unadjusted figures to apportion Representatives among the States."

In 1970, for example, the Bureau conducted a sample reinterview survey of 13,546 housing units that enumerators had initially reported to be vacant, determined that 11% of those units were actually occupied and adjusted the decennial census accordingly. To adjust, the Bureau generalized the results of its survey to all housing units that had initially been reported vacant, deeming 11% of them occupied. To generate populations for the units deemed occupied, and characteristics for the generated populations, the Bureau used a type of probabilistic technique known as statistical imputation: each unit deemed occupied was assigned the same number of residents, with the same characteristics (race, sex, age and so on), as the unit that followed it in the Bureau's processing

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[2] Margo J. Anderson, *The American Census: A Social History* 201 (1988).

sequence. On the basis of imputation, the Bureau added 1,069,000 persons to the 1970 census count. Tr. 260, 268-271; PX 474 at 11-14. The same decennial census was also adjusted in one part of the country by the Post-Enumeration Post Office Check. In rural Southern areas where the Bureau found that housing units had been omitted from its address lists, it asked the Post Office to recheck the Bureau's lists, conducted a sample of interviews for omitted addresses and generalized the results throughout the region to add another 484,000 persons. Tr. 269-273; PX 474 at 15-16.

In 1980, where the Bureau had no other source of information about the occupancy status of housing units, statistical imputation was used to generate a status (occupied or vacant) and then, for units imputed to be occupied, to generate resident populations and their characteristics. Imputation added to the 1980 counts 762,000 persons in housing units for which occupancy status was unknown. Tr. 273-274. The result affected the apportionment of the House of Representatives, shifting a seat from Indiana to Florida. Indiana sued to reverse the outcome, *Orr v. Baldrige*, No. IP 81-604-C (S.D. Ind.), but the Bureau's decision to proceed with imputation (and the consequent effect on apportionment) was upheld. Tr. 274, 1289-1291, 1843.

2. Recognizing that the Bureau uses statistical adjustment only hints at the complexity of "how we actually count people." When the Bureau imputes an occupancy status to a housing unit for which no occupancy status is actually known, when the Bureau then imputes to that unit a number of residents and imputes to them particular characteristics, the Bureau is surely creating a datum that, in one sense, can be described as an error: it is very unlikely that the particular unit that, as a result of imputation, is deemed occupied by three persons (a 30-year-old white male, a 29-year-old white female and a 5-year-old white female), is actually occupied

by three persons with those characteristics. Yet imputation is in keeping with the Bureau's overall approach to the census.

That approach begins with the recognition that the census is inevitably laden with error. The National Academy of Sciences has observed, "The evidence is overwhelming that no counting process, however diligent, will in fact enumerate everyone." PX 2 at 17. A survey of a quarter-billion persons cannot achieve perfect accuracy, locating every person exactly where he or she resided on Census Day.

Census errors are of two kinds—gross omissions (persons who were not counted at all but should have been or who were not counted at the right location) and erroneous enumerations (persons who were counted but should not have been, because they were born after or died before Census Day or because they were not residents of the country or because they do not exist, persons who were counted two or more times and persons who were counted at the wrong location).[3] Tr. 80-83; PX 54, App. 3 at 1-2. Those kinds of errors are endemic to the census: for example, in 1991 the United States General Accounting Office ("GAO") estimated that "the 1990 census contained a minimum of 14.1 million gross errors and perhaps as many as 25.7 million errors, depending on how broadly census error is defined." PX 16 at 1. GAO's minimum estimate is based on 9.7 million gross omissions and 4.4 million erroneous enumerations.[4] *Ibid.* The Secretary

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[3] When a person who was a resident of the country on Census Day is counted just once, but at the wrong location, there is both a gross omission (at the location at which the person should have been counted) and an erroneous enumeration (at the location at which the person is actually counted).

[4] GAO also pointed out that that level of error represented a substantial degradation in data quality from 1980. Using the same "minimal definition of census error," GAO found that the 1990 census contained far more error (14.1 million errors in a count of about 248.7 million) than the 1980 census (7.8 million errors in a count of about

himself, in his decision, accepted as a "defensible" maximum estimate the Bureau's calculation of 19.1 million gross omissions and 13.1 million erroneous enumerations. Pet. App. 261. Earlier this year, the National Research Council estimated total error in the uncorrected 1990 census counts at about 20 million gross omissions and 16 million erroneous enumerations.[5] Thus, the amount of error in the uncorrected 1990 census is between 5.7 and 14.4 percent of the overall population figure.

Error arises at every step of the census-taking process. The Bureau begins the census with the construction of address lists for the mailout of questionnaires (and later follow-up by enumerators); irregular, unreported housing units (converted garages, subdivided apartments) are often missed. Tr. 108-111; PX 455 at 9; PX 456 at A001722. Mailed questionnaires are subject to loss or vandalism. Tr. 136-137. The complexity of the questionnaire and ambiguities in classifying individuals who reside temporarily at one or more addresses lead to both omissions and double-counting. Tr. 149; PX 464 at 163; PX 465 at 007701.

For housing units that do not respond to the mailed questionnaire, the Bureau deploys enumerators to conduct the door-to-door phase of the census called non-response follow-up. Pet. App. 327-328. In 1990, the Bureau had projected and planned for a mail response rate of 70%; in fact, the mail response rate was only 63%. Pet. App. 327. The lower-than-expected mail response rate placed unanticipated burdens on the Bureau's enumerators, the vast majority of them temporary, short-term employees. Tr. 132, 1823; PX 383 at 7; PX 458. Enumerators were instructed to make six attempts at contact, three in person and three by telephone, after which

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226.5 million). PX 16 at 7.

[5] National Research Council, *Modernizing the U.S. Census* 33 (1995).

they were permitted to obtain "last resort"[6] information from a person deemed "knowledgeable" by the enumerator. Tr. 161. Last resort information therefore came from neighbors, building superintendents, local mail carriers or local police officers. Tr. 161. By that stage of the process, the Bureau has no doubt that the quality of the information is of limited reliability. Tr. 1825-1827.

An example of the unreliability of last resort information is provided by results of the Bureau's "Pop 1" check. During the 1990 census the Bureau heard reports that enumerators were mechanically listing the populations of large numbers of housing units as one person, without any actual information to support their reports. Tr. 175. The Bureau rapidly created "Pop 1," an *ad hoc* check of housing units for which enumerators had reported single residents from last resort information; the Bureau found the counts in error in 44% of the housing units rechecked. Tr. 178; PX 473. "Pop 1" was limited to only 24 (of 447) district offices and covered only 128,000 housing units. Tr. 176-178; PX 473. But in a national survey of 1,000 one-person housing units counted during non-response follow-up, the Bureau found over 20% of the count in error. Tr. 180; PX 473. The Bureau did not adjust the counts on the basis of those results, concluding that it would rely instead on the more comprehensive post-enumeration survey that is the subject of this litigation. Tr. 180; PX 473 at 1.

That the decennial census has so much error does not mean that it is worthless. It does, however, suggest the complexity of defining what census error is and, indeed, what

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[6] Technically, "last resort" information was supposed to include "at least basic information on household member(s)", Pet. App. 328, but in the late stages of non-response follow-up, when Bureau offices began shutting down, even less thorough "closeout" data were accepted. Tr. 162-163.

the census itself is. The census is not a simple headcount of the national population. It is an estimate, and it is affected by the choice of techniques that go into its production. As Vincent Barabba, formerly Director of the Census Bureau, wrote in his book *The 1980 Census: Policy Making amid Turbulence* (1983) (with Ian Mitroff and Richard Mason):

> "The number that is accepted as [the] true population of the United States is merely a scientific estimate. This estimate is not a simple addition of all persons and only those persons directly enumerated by census enumerators. Indeed, the number of people in the United States cannot be confirmed by immediate experience. It is dependent on complex scientific and management models and processes that are designed to ensure the taking of an accurate census insofar as humanly possible."

PX 13 at 5. Similarly, Barbara A. Bailar, then Associate Director of the Bureau for Statistical Methodology, wrote in a 1983 paper, "Counting or Estimation in a Census—A Difficult Decision":

> "The issue is not really whether there should be counting or estimation; the real issue is how much estimation there should be. There has probably always been some estimation in the census."

PX 14 at 3; *see also* Tr. 1510-1515. The conventional formats in which the Bureau releases the best-known census data products obscure the extent to which the census is an estimate. The Bureau uses exact, unrounded numbers unaccompanied by estimates of error to describe the population: for example, the official, unadjusted 1990 census count of the national population is 249,632,692. Pet. App. 49. The Bureau also issues, for redistricting purposes, block-level census data. The happenstance that the Bureau uses those formats does not change the fact that, at both the national and block level, the counts are estimates.

Viewing the census as an estimate entails recognition that, for the purposes for which the census is conducted, many errors are random and thus offset one another. It would be misleading to characterize the unadjusted 1990 decennial census as about 10% error and to leave the matter at that. Much error appears only at the block level. Consider, for example, a person who is otherwise correctly counted but located in the census counts at the wrong address in a block adjacent to the one in which he or she should properly have been counted: both block counts are erroneous, but the larger unit that includes the two blocks (the census tract) is unaffected. At the block level, census counts are indeed highly inaccurate.[7] But as those counts are aggregated, random errors cancel: for example, the omission of one person who should have been counted is offset by the erroneous double-counting of another person in the same town. The census thus achieves greater accuracy at the higher levels of aggregation at which census data are actually used—from the local legislative district on up through the town, the county, the State and the nation. Tr. 1314-1316.[8]

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[7] Analysis of block-level inaccuracy in the uncorrected 1990 census did not take place until after the trial of this action. Recent Bureau research on the block-level error structure of the uncorrected census is discussed in National Research Council, *Modernizing the U.S. Census* 35-37 (1995).

[8] Because accuracy in census-taking depends upon development of a complex system for balancing error, rather than simply adding observations to produce a more complete "headcount," naive intuitions about the value of increasing resources are often mistaken. Making what is intended as a rhetorical point, Wisconsin writes:

> Hiring 400,000 enumerators should produce a more accurate census than employing 300,000, yet either level would seem constitutionally permissible. * * * Ten attempts at non-response follow-up should yield more accurate counts than six attempts, which should yield more accurate counts than four attempts.

The combined pattern of omissions and erroneous enumerations yields net undercount (or overcount, as the case may be), which is simply the difference between total omissions and erroneous enumerations at a particular level of aggregation. Tr. 90. Although omissions and erroneous enumerations can be treated as cancelling out one another at particular levels of aggregation (such as the nation as a whole), they are not distributed evenly (certainly not across the entire nation). Tr. 89-90. A net undercount of zero, therefore, cannot be taken as indicating an absence of census error at subordinate levels of aggregation nor an absence of differential undercount. Tr. 90-91. As GAO reported, "A focus on the *net* undercount obscures the true magnitude of the error in the census because, while millions of persons were missed by the census, millions of other persons were improperly counted." PX 16 at 1 (emphasis in original). Moreover, although some census error is random, much of it is not. It is systematic error that creates the differential undercount.

Wisc. Br. 22. Neither survey research in general nor census-taking in particular is so simple. There is no necessary reason to suppose that more enumerators or more attempts at non-response follow-up will increase *accuracy*. Either approach would surely add *responses*. But the fact of more responses does not translate unproblematically into the fact of increased accuracy. Beyond a certain point, additional responses are disproportionately likely to add error, because a disproportionate number of "late census additions" are erroneous enumerations. Tr. 1825-1827. The particular level of non-response follow-up selected by the Bureau—six attempts—may well represent the best balance of addition of new information and limitation of error in the interest of maximizing accuracy; it is not obvious a different balance would have increased accuracy. In fact, it is entirely plausible that in 1990 the Bureau did the best job possible of counting the population under the constraints of "traditional" means of conducting the census. The Bureau itself believed so, which is why it focused on adjustment, rather than expanding other census operations, as the vehicle to reduce differential undercounting.

3. When census error occurs systematically, that is, when the same causes consistently create the same types of error, aggregation does not help: there are no offsetting errors of the opposite type to improve accuracy. There is no dispute that the most serious source of systematic error in the census is the differential undercount of minorities. That differential undercount has been a feature of the census for a long time—probably for as long as the decennial census has been conducted. Tr. 1276. Because minorities are geographically concentrated, the differential undercount has consequences in terms of the fairness with which political power and governmental funds and services are allocated. Tr. 103-105; Jt. App. 79; Pet. App. 128-129.

When he announced his decision against adjustment, the Secretary estimated that in the 1990 census blacks had been undercounted by 4.8%, Hispanics by 5.2%, Asian/Pacific Islanders by 3.1% and American Indians by 5.0%, while non-blacks (a category that includes some Hispanics) had been undercounted by 1.7%, Pet. App. 138-139; thus, the black/non-black differential undercount was estimated to be 3.1. That estimate was in keeping with experience from other censuses and using other measurement techniques.

By one yardstick, demographic analysis (which provides a measure of the black/non-black differential at the national level), the black/nonblack differential has had the following notable constancy: in 1940, when the overall undercount (*i.e.*, for all residents, regardless of race) was 5.4%, the black undercount was 8.4% and the non-black 5.0%, for a differential of 3.4; in 1950, the overall undercount fell to 4.1%, but the differential rose to 3.8; in 1960, the overall undercount fell again, to 3.1%, and the differential rose again, to 3.9; in 1970, the overall undercount went down to 2.7%, and the differential went up once more to 4.3; in 1980, the overall undercount dropped to its lowest level, 1.2%, and the differential fell to 3.7; in 1990, by demographic analysis, the

overall undercount was up to 1.8%, and the differential undercount rose to its highest recorded level, 4.4. Tr. 195-199; PX 476; PX 477. Uncertainties in demographic analysis suggest that marginal changes in undercount rates should not be overemphasized; but the pattern of consistency in the differential undercount is a reliable indication that differential undercount is a real and persistent problem in the conduct of the decennial census. Tr. 883-887; PX 184; PX 197.

Demographic analysis does not permit analysis of undercount by local areas, such as States, nor does it give a separate figure for Hispanics. However, the Bureau's 1980 post-enumeration program and the 1986 test census in East Los Angeles confirmed a differential undercount of Hispanics and the concentration of differential undercounts of blacks and Hispanics in inner cities. Tr. 1277; PX 5, App. E.

4. Why differential undercount occurs is no mystery; it is an inherent consequence of the method currently used to conduct the census. Tr. 105-106. The problem is not that the census is badly conducted; the problem is that because of the social arrangements that govern an increasingly diverse and mobile population, the method used to count the population inevitably produces an undercount that is more severe among certain parts of the national population. Tr. 505-506. At each step of its conduct, the census-taking process, despite the Bureau's best efforts, systematically generates a differential undercount. Tr. 106-194.

Under the census-taking approach used in 1990 and for previous decennials, the first problem arises in the construction of the address lists used by the Bureau as the basis for the mailout of census questionnaires and, later, to determine the housing units from which no responses have been received and to which enumerators will be sent. Tr. 129-130. Minority households, disproportionately located in inner city neighborhoods, are more likely to be left off the address lists; they are also less likely to receive questionnaires mailed

out to them. Tr. 136. Minorities who do receive questionnaires are less likely to complete and return them, because of language difficulties and because the complex questionnaire is daunting for someone with less education or a more complicated family structure. Tr. 144-146. For the same reasons, even if the questionnaire is filled out and returned, it is more likely that it will contain errors than will the typical questionnaire filled out by a non-Hispanic white respondent. Tr. 146-151.

Because mail response rates are lower in inner cities, the census relies more heavily there on enumerator visits. Those areas are the ones where the Bureau encounters the greatest difficulty in hiring and retaining enumerators, and the enumerators who are hired are least likely to obtain information sought—because addresses in projects and irregular multi-unit structures are hard to find, because fear of crime discourages enumerators from aggressive interviewing, and because language problems impede interviewing. Tr. 164-165, 1825.

If an enumerator cannot get a response from a member of a household, the unit may be counted through the less reliable alternatives of "last resort" or "closeout" or treated as "non-data-defined." Tr. 160-163, 1825-1827. Bureau research on the 1990 census shows that "last resort" counts reflect serious undercoverage. Tr. 176-178; PX 473. In the 1990 census, minority households were more likely than others to be enumerated through "last resort" or "closeout" or treated as "non-data-defined." Tr. 171-174.

The persistence of a differential undercount does not reflect badly on the Bureau. In 1990, as in 1980, the Bureau made every effort to overcome those problems through expanded outreach efforts, but in 1990, just as in 1980, those efforts failed to reduce, let alone eliminate, differential undercounting. As the former Chief of the Bureau's Statistical Research Division, Kirk M. Wolter, stated at the trial of this

action, "In spite of all the Bureau's good efforts, and in spite of decades of work, in spite of billions of dollars over the many decades, the differential undercount has remained persistent, constant, almost intractable, at least intractable for the kinds of conventional enumeration methods the Bureau has utilized." Tr. 506.

B. Census Correction

1. Having long known of the existence of the differential undercount, the Bureau was aware in 1980 that the census that year reflected the same problem. Accordingly, the Bureau considered whether to correct the 1980 census to alleviate the problem. Tr. 1276.

Through Department Organizational Order 35-2A of August 4, 1975, the Secretary of Commerce had delegated to the Director of the Bureau authority to conduct the census as the Director determined. Tr. 1284-1285; PX 604. In 1980 Secretary of Commerce Philip A. Klutznick reaffirmed to Director Barabba that the delegation meant the determination whether to correct the 1980 census was to be made by the Director, which would prevent the appearance of partisanship in the decision. Tr. 1285-1286; PX 605.

The Bureau decided against adjusting the 1980 census, despite the differential undercount affecting it, because of technical limitations on each of the two techniques that might have been available for the purpose. Tr. 1282-1283. One possibility that the Bureau considered was adjusting on the basis of demographic analysis. But demographic analysis—which uses historical comparison of records of births, deaths and in- and out-migration—does not yield local level data. Tr. 1282-1283. The other possibility that the Bureau had was to use the results of the post-enumeration program ("PEP"), a forerunner of the post-enumeration survey used in 1990. The PEP had indeed generated valuable data reflecting the dimensions of undercounting in the 1980 census; however,

problems of missing data and matching error and other uncertainties about the survey's error structure made the PEP unsuitable, in the Bureau's view, for use in adjusting the census. Tr. 1277-1283.

Although concluding that the 1980 PEP could not be used for adjustment of the 1980 census, the Bureau was encouraged by what it had learned in conducting the PEP and believed adjustment might be feasible in 1990. Tr. 567-568. The Bureau determined that addressing the problem of differential undercount would be made a major priority in planning for the 1990 census. Tr. 516-521. The Bureau began planning for the 1990 census and adjustment in the early 1980's. Tr. 522-526.

In 1984-1985, the Bureau established an Undercount Steering Committee, comprising the senior Bureau executives whose divisions would be most directly involved, to coordinate the statistical and demographic research and the operational planning necessary for a possible adjustment of the 1990 census. Tr. 516-521, 1292. The Bureau also established an Undercount Research Staff, under the supervision of Dr. Wolter, which was charged with research into the causes of differential undercount, determination of the best approach to reducing differential undercount in the 1990 census and coordination of research to achieve that goal. Tr. 516-521.

Public review of the Bureau's research projects was a formal part of that process. PX 545 at 1. Believing it important to establish a consensus of support among professional groups and other communities that use decennial census data, the Bureau established contact with outside groups. Tr. 521-525. Standing advisory committees of, among other organizations, the American Statistical Association and the American Population Association were asked to review and comment upon Bureau research initiatives and findings in the areas of undercount and correction during the 1980's.

Tr. 1295-1296. The Bureau also contracted with the National Academy of Sciences ("NAS") to create a Panel on Decennial Census Methodology to provide the Bureau with wide-ranging advice drawn from a number of academic specialists approaching the issue of statistical correction from different backgrounds and orientations. Tr. 1295-1296, 1469-1474.

As a result of the Bureau's communications and coordination with independent academics and researchers, with the advisory committees, and with the NAS panel, consensus was reached that the post-enumeration survey could ameliorate the differential undercount. Tr. 524-525, 622-623. Except for a few theoretical extremists, the statistical community concluded that adjustment of the census was feasible. Tr. 525, 1383-1386.

After reviewing other possibilities, the Undercount Research Staff focused its analysis on further development of a "capture-recapture" or "dual system estimation" approach, picking up from the work that had been done in connection with the PEP. Tr. 560-561. The essential feature of dual system estimation is the use of a second measurement to ascertain the quality of estimation obtained by an initial measurement. Put in terms of a census, a dual system estimate is obtained when an initial survey (the enumeration, or "capture") is followed by a second measurement (the post-enumeration survey, or "recapture"), in which the variable to be measured is the frequency with which persons were properly recorded in the first count. Tr. 506-513. The Undercount Research Staff concluded that dual system estimation held the greatest hope for effective correction of the census to reduce differential undercount. Tr. 560-561.

2. The Undercount Research Staff, during the mid-1980's, developed a post-enumeration survey that would overcome the obstacles that had prevented making use of the PEP as a basis for adjusting the 1980 census. Tr. 567-575. Using the PEP as a starting point, the Bureau designed the 1990 PES with error-

resistant improvements. PX 703. Among many other refinements were a process for construction of an independent address list to permit identification of errors arising from inadequacies in the lists used for the uncorrected counts, Tr. 209-210; PX 9 at 4-11, and development of an automated matching system to facilitate reliable comparison of the populations found in the original count and in the PES. Tr. 508-509, 1297-1298.

The actual adjustment to be produced by the PES would be carried out through post-stratification. Tr. 513. For that purpose, the country would be divided into more than a thousand post-strata (ultimately, the Bureau settled on an arrangement involving 1,392 post-strata), each defined by geography, age, race, sex, Hispanic (versus non-Hispanic) origin and "tenure" (status of the housing unit as rented or owner-occupied). Tr. 513-514. The categories selected were the ones the Bureau had determined in its own research and in its review of research by other specialists to provide the greatest explanatory power in analyzing differences in undercount rates. Tr. 513-514. Thus, the Undercount Research Staff approach would provide one undercount figure for, say, black males between the ages of 20 and 29 living in rented housing units in New York City, another figure for black females of the same age group living in the same units, another for equivalent non-black Hispanic males and so on. Tr. 513-514; PX 54, App. 5. The post-stratification scheme, by dividing the country into an exhaustive set of non-overlapping post-strata, would define a unique undercount factor associated with each person. Tr. 513-514. The actual adjustment would be based on application of the undercount figures associated with particular post-strata to the blocks in which those post-strata were located. PX 54, App. 3.

The Bureau's post-stratification was designed to control "correlation bias"—the tendency of the PES to miss the same people missed by the uncorrected census. In estimating the

population, a post-enumeration survey that groups together persons with low capture probabilities and persons with higher capture probabilities will tend to understate the undercount. Tr. 578-579; PX 5 at 9-2. The principle underlying the Bureau's post-stratification design was to group within each post-stratum individuals having a generally similar likelihood of being counted in the census. The assumption was not that they would share exactly the same probability, but rather that individuals within a post-stratum would be more similar to one another (with respect to their likelihood of being counted in the census) than to individuals in other post-strata. Tr. 205-208.[9]

The design of the PES represented an improvement over the 1980 PEP in important respects. But the PES—and the contemplation of its use to correct the 1990 census—did not represent a radical departure in the conduct of the census. As already observed, the Bureau had made use of statistical adjustment in previous censuses.

The specific technique of a post-enumeration survey had been repeatedly used, in one form or another, by the Bureau, well before 1990. The Bureau conducted its first post-enumeration survey in 1950. PX 19. It used variations on the technique in 1960 (PX 20), 1970 (PX 21), and 1980 (PX 3). More generally, the capture-recapture model, upon which the post-enumeration survey technique is based, has been applied to human populations since 1931, when it was first used in connection with the Canadian census. Adaptations of the technique to the census context have been discussed in the

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[9] Thus, the United States is misleading in writing, "For example, a post-stratum for white single male renters, aged 20-29, living in New York City 'assumes' that the capture probability for a 29-year-old white male law firm associate living in a rented condominium in Manhattan is the same as the capture probability for a 20-year-old white male laborer who rents a room in Queens." U.S. Br. 12.

scientific literature for decades. Tr. 1528-1532; PX 18. Other components of the PES design, such as stratification and smoothing,[10] are also widely used by the Bureau or other survey researchers. Tr. 514-515.

The PES and its components were subjected to a rigorous battery of field-tests throughout the mid-1980's. Tr. 602-603. There were tests in Tampa, Florida in 1985, in Mississippi and in Los Angeles in 1986, and in North Dakota in 1987. The PES was further tested in the "dress rehearsal" census conducted in 1988 in St. Louis, in other parts of Missouri, and in Washington State. Tr. 602. Multiple testing ensured that every aspect of the PES was tested under field conditions and also gave the Bureau test results to permit further refinement and improvement of PES design. Tr. 602-603. The tests confirmed the reliability of the PES design, the success of the Bureau's innovations and the ability of the adjustment process to generate more accurate census counts. Tr. 609-614. The tests also showed that the PES would find many—but by no means all—persons missed by the census; adjustment would improve census accuracy but would not *over*correct the undercount. Tr. 612-613.

3. By the spring of 1987, the Undercount Research Staff had completed extensive research on, planning for and field

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[10] Where multiple, related post-strata are created, survey researchers often assume that useful information about the behavior of one post-stratum may come from other, related post-strata. Smoothing in the PES supplies that information systematically, by using other PES-derived data to "predict" the undercount rate for a post-stratum and then generating a weighted average of the predicted and observed undercount rates. Smoothing enhances confidence in PES-derived undercount rates and does so, technically, by reducing sampling error. While it is true that, as the United States says, smoothing is an "attempt to correct for sampling error", U.S. Br. 9, every component of the uncorrected census, from non-response follow-up through last resort and closeout, could equally well be described as an "attempt to correct for non-sampling error."

tests of the PES. Based on that body of work, Dr. Wolter and the Undercount Research Staff concluded that adjustment of the 1990 census was technically feasible. Tr. 619; PX 5; PX 148.

The basis for their conclusion was the determination that their work had successfully identified all major potential sources of error in the PES-based adjustment. PX 5 at 7. The eight sources of error were missing data, matching error, error in determining the number of erroneous enumerations, fabrications, balancing error, respondents' misreporting of Census Day address, correlation bias and random error. PX 5 at 2-1 to 2-3. Dr. Wolter and the Undercount Research Staff determined that the PES-based adjustment designed by the Bureau could be expected to control all sources of possible error, yielding an adjustment more accurate than the uncorrected census counts. PX 148.

As the Bureau moved forward with planning for adjustment, however, the Commerce Department for the first time displayed an interest in the subject—an interest that immediately took the form of hostility. In a memorandum dated May 19, 1987, Harry A. Scarr, executive assistant to Under Secretary Robert Ortner, wrote to Dr. Ortner: "You asked for problems with adjustment. Here are some." PX 574, cover memorandum. Dr. Scarr went on to identify, as "adjustment problems," the facts that:

> "In general, it can be assumed that states or places with large minority populations will have population added to their counts. * * * States with large minority populations would benefit from an adjustment and states with small minority populations would lose seats."

PX 574, attached memorandum at 1. And he pointed out "groups that are likely to be pro adjustment" and "groups that are likely to be against adjustment." Among the former, Dr. Scarr particularly expected to find "[p]oliticians from those

cities or places with large minority populations"; among the latter, he noted "[p]oliticians representing those areas which might be expected to lose shares of fixed pies . . . , i.e., those areas with small minority populations." PX 574, attached memorandum at 4.

On May 20, 1987, the Bureau's senior staff met to discuss a recommendation on planning for adjustment. With virtual unanimity, the staff concluded that adjustment was technically feasible, although there were reservations expressed about the Bureau's ability to provide a timely set of corrected figures. Tr. 1310-1317; PX 597. Under the direction of the Bureau's Associate Director for Statistical Methodology, Dr. Bailar, a record of the staff's deliberations was compiled and presented to the Bureau's Director, John G. Keane. Tr. 1310-1311; PX 597. After reviewing the record, Dr. Keane concluded that prospects for a successful adjustment were good, that the problem of differential undercounting was serious and otherwise intractable, and that the Bureau should proceed with plans to adjust the 1990 census. Tr. 1318.

Dr. Keane made his decision assuming that, as with all other decisions about census operations and pursuant to the existing delegation of authority from the Department of Commerce to the Director of the Census, the decision whether to proceed with planning for adjustment was one that he had the authority to make. Thus, Dr. Keane prepared for the public announcement of the Bureau's determination to proceed with plans for a correction, including the development of an appropriate press release and body of material for general circulation. Deposition of John G. Keane ("Keane Dep."), at 448-449. Before making a public announcement, however, Director Keane met on June 2, 1987 to brief Under Secretary Ortner, his immediate superior. Tr. 1320. In that briefing, Director Keane explained the rationale for his decision:

> "No matter how well we conduct the 1990 census we do not expect to eliminate the differential undercount. * * * We use every known cost efficient counting procedure and advertising approach to cover those segments of the population we miss. Statistical techniques are the only potential means of reducing the differential undercount."

PX 232 at 1.

After that briefing, the Commerce Department removed the authority to decide the adjustment question from Director Keane. Tr. 1321; Keane Dep. 452-453. Although the Department issued no immediate statement, on October 30, 1987 it issued a press release informing the public that the 1990 census would not be adjusted. PX 475. The press release, two-and-a-half pages long, offered little explanation for the decision, other than the general assurance that the 1990 census was expected to be good enough not to need adjustment. *Ibid.*

The *City of New York* lawsuit was filed in November 1988, after plaintiffs had spent a year obtaining, pursuant to Freedom of Information Act requests, and reviewing the documentation supporting the Bureau's determination to proceed with planning for adjustment. Plaintiffs initially sought a preliminary injunction to reinstate the Bureau's plans for the PES, without which there would be no possibility of adjusting the 1990 census. On July 17, 1989, as the district court was about to begin a hearing on the application, the parties entered into a stipulation, simultaneously entered as an order of the court, resolving the motion. Jt. App. 61. Among other provisions, the 1989 stipulation vacated the Department's decision against adjustment and committed the defendants to reconsider the question of adjustment with an open mind and without prejudgment (¶ 2); obligated the defendants to conduct a PES of not fewer than 150,000 housing units—a number they represented to be large enough for the purpose—and all other adjustment-related operations

necessary to ensure the possibility of using the PES-based population figures to adjust the census (¶ 3); required the defendants to "develop and adopt guidelines articulating what defendants believe are the relevant technical and non-technical statistical and policy grounds" for the adjustment decision (¶ 4); required that the Secretary announce a decision by not later than July 15, 1991 and that, were he to decide against adjustment, he accompany the decision with a detailed explanation of the grounds therefor (¶ 5); required that any census counts issued before the adjustment decision be accompanied by a legend advising recipients that the data were subject to possible adjustment (¶ 6); and established that the Secretary would appoint a special advisory panel of eight members (¶ 7), four of whom were to be nominated by plaintiffs' counsel and the other four selected by the Secretary at his discretion. Jt. App. 62-64.

4. The Department of Commerce published eight guidelines for the adjustment decision on March 15, 1990.[11]

The guidelines did not lay the groundwork for a neutral decision on adjustment dictated solely by a determination whether adjustment would increase the accuracy of the census. Ignoring the history of statistical inference in compilation of past censuses and unwilling to acknowledge the Bureau's expertise in assessing improvements in census

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[11] Each of the eight guidelines was accompanied by an "explanation." Final Guidelines for Statistical Adjustments of 1990 Census, 55 Fed. Reg. 9,838 (March 15, 1990). The material reproduced in the Secretary's decision includes the original guidelines and the explanations that accompanied them upon their publication; the discussions in the decision were not published until issuance of the Secretary's decision. For the original guidelines and explanations (corresponding to the March 15, 1990 publication), *see* Pet. App. 151-156 (text of guideline and explanation for guideline one); 202-203 (guideline two); 213-214 (guideline three); 228-229 (guideline four); 238 (guideline five); 241-242 (guideline six); 249 (guideline seven); 256-257 (guideline eight).

accuracy, the Department stated that "the assertion that a method involving statistical inference could lead to a more accurate enumeration warrants close scrutiny." Pet. App. 152. For purposes of that "close scrutiny," the Secretary's first guideline erected a presumption in favor of the superior accuracy of the unadjusted counts. To rebut that presumption, "the evidence . . . must show *convincingly* that the count can be improved by statistical adjustment at national, state *and local* levels." *Ibid.* (emphasis supplied). The requirement of *convincing* evidence of improvement at *local* levels would necessarily subject the adjusted figures to a test of extraordinary rigor; nowhere in the guideline or its explanation, however, is there an attempt to justify imposition of that test in terms of improving the accuracy of census data for their constitutionally or statutorily required uses.

As its broad language foretold, guideline one was to become the primary basis for the Secretary's decision. The presumption against correction was invoked to justify the Secretary's disregard of evidence that the adjusted counts improved the numeric accuracy of the counts, his concern that improved distributive accuracy be demonstrated across a wide range of comparisons without regard to how census data are actually used and his approach to analyzing distributive accuracy—an approach the United States subsequently admitted was invalid. In practice, the presumption against correction in guideline one proved irrebuttable, permitting the Department of Commerce to reinstate its 1987 decision against correction. That presumption, and only that presumption, underlies the Secretary's determination that the adjusted counts that ameliorate the differential undercount are less accurate than the unadjusted counts that preserve the differential undercount.

5. The uncorrected 1990 enumeration confronted all of the difficulties that have typically prevented the census from achieving an accurate count of such groups of Americans as

minority residents of inner cities. As the count progressed, there were constant indications that the census, once again, was having difficulty enumerating that hard-to-count population, just as the Bureau had predicted, and that coverage improvement programs would not be able to offset that disadvantage. Tr. 260-263.

The uncorrected census counted 248.7 million residents of the United States. The PES-based adjusted census counted 254.0 million. PX 478. Demographic analysis estimates provided a national population figure of 253.4 million, not significantly different from—and thus essentially confirming—the PES-based count. PX 55 at 5-7, 10.

The PES-based estimate found that the overall net national undercount rate for the uncorrected enumeration was 2.1%, or 5.2 million out of a population of 254.0 million. As expected, the undercount was far more severe among minorities. The undercount rate for blacks was 4.8%. Of the population missed by the uncorrected enumeration, more than 1.5 million out of 5.2 million were black; thus, while constituting only 12% of the national population, blacks were 29% of those omitted from the uncorrected count. The undercount rate for Hispanics was even higher: 5.2%. About 1.25 million Hispanics were missed by the uncorrected enumeration; Hispanics, constituting 9% of the national population, were 24% of the total uncounted. The undercount rate for American Indians was 5.0%, for Asian/Pacific Islanders 3.1%. PX 478.

In general, undercounting was concentrated in areas where minorities are concentrated—in California, Texas, Florida and other states of the Southwest and South and in major cities across the country. The state with the highest percentage minority population in the continental United States, New Mexico, had the highest undercount rate, 4.5%. The undercount rate in California of 3.7% reflected the omission in the uncorrected count of over one million people in the

state, nearly 200,000 of them in Los Angeles alone, which had an undercount rate of 5.1%. In Texas, with a statewide undercount rate of 3.2%, more than 500,000 people were missed. In Houston alone, with an undercount rate of 5.0%, more than 85,000 people were missed. In Florida as a whole the undercount rate was 2.6%; in Miami, it was 4.6%. Undercounts well above the national average were also found in the big cities of the Northeast, Mid-Atlantic and Midwest, including New York (3.0%), Chicago (2.6%), Detroit (3.5%), Baltimore (4.7%) and Washington, D.C. (5.0%). By contrast, the PES results showed that the disproportionately white populations of the Great Plains, Midwest and Northeastern (especially New England) states tended to be fairly well covered by the uncorrected enumeration. *Ibid.*

The PES results showed too that the uncorrected census counts led to a malapportionment of the House of Representatives, with two seats erroneously assigned to Wisconsin and Pennsylvania that should in fact have gone to California and Arizona, respectively.

The use of a fixed formula that apportions congressional seats based on state population—the "method of equal proportions" required by 2 U.S.C. § 2—makes it possible to determine precisely the consequences of using the uncorrected enumeration for the apportionment of the House, that is, for the allocation of political representation *among* states. Similar exactitude cannot obtain in describing the consequences for the drawing of district lines *within* states, whether for congressional or state legislative seats, because those lines are typically the product of political negotiations rather than automatic formulas. But the general effect is clear. The concentration of undercount among minority populations means that when the uncorrected enumeration is used for redistricting disproportionately minority districts are systematically overpopulated. The consequence, when that effect occurs throughout a state, is to reduce the number of

districts likely to be represented by minorities and thus the amount of representation accorded to minority residents of the state.

Plaintiffs presented evidence at trial demonstrating the effect of that pattern. Tr. 1199-1208. Looking at California congressional districts actually drawn using uncorrected 1990 census data, one sees that the highest undercount is consistently recorded in districts with heavily minority populations, with the highest undercounts in South Central Los Angeles and Watts, and the lowest undercount in districts with non-minority populations, such as the middle-class suburbs. Tr. 1200-1203. The result is that for congressional districts, each of which is supposed to have virtually the same population, there is in fact a marked disparity. Minority districts are overpopulated by about 4 to 5 percent, while non-minority districts are underpopulated by about 2 to 3 percent. Tr. 1207. In the case of California's congressional districts, the special masters who drew the district lines intended that the districts have a population variance of only one-half of one percent. Tr. 1207-1208. Thus, the effect of the differential undercount left uncorrected in the census is to disturb the effort to achieve equipopulous districts and to produce districts that deviate from equipopulousness far more than is constitutionally permissible. Tr. 1207. The same pattern of correlations between minority populations and severity of undercounting can be seen across state senate and assembly seats in California. Tr. 1203; PX 587; PX 588; PX 589.

6. The results of the PES—nationally and within racially and ethnically heterogeneous states such as California—accord with expectations about census coverage. The largest undercounts were recorded where minority populations are greatest. In that sense the PES results have "face validity." Tr. 1544-1545. The face validity of the PES results was one factor taken into account by the Bureau's Director, Barbara E. Bryant (who had succeed Dr. Keane in 1989), and the

members of the Undercount Steering Committee as they reviewed the results of the PES and the uncorrected census in June 1991 in order to determine whether the adjusted or the unadjusted counts were more accurate and whether the census should be adjusted. They took into account as well the general agreement between the demographic analysis estimates and PES-based figures, which accord in finding a severe undercount running through the uncorrected enumeration. As Director Bryant put it: "Two independent types of research provide estimates that the resident population of the United States is 253-254 million, not 248.7 million, as enumerated." Jt. App. 73.

In reaching their conclusion, both Dr. Bryant and the members of the Undercount Steering Committee majority stressed that the PES was planned and conducted superbly. Dr. Bryant wrote: "The quality of the 1990 Post-Enumeration Survey is excellent." Jt. App. 73. And the Undercount Steering Committee majority stated that its "conclusion is based in large part on [the] finding that the post-enumeration survey is a measurement instrument of unusually high quality." PX 54 at 2.

The Bureau's leadership was able to arrive at those conclusions because the potential sources of error in the PES had been painstakingly established by the Undercount Research Staff during the 1980's and the actual levels of error in the PES had been thoroughly calibrated by the extensive series of evaluation studies—the "P-projects"—conducted by the Bureau as an application of the adjustment standards that had been developed since 1987. PX 540A. Those studies showed that each of the measurable sources of error had been controlled, leaving survey results that could reliably be used to adjust. Tr. 646-650.

The Bureau reached the conclusion that missing data were not a problem in the PES by carefully studying the effects of using alternative imputation models to deal with missing data

in generating the adjusted counts. PX 540A.1. That study—PES Evaluation Project P1—demonstrated that there was an extremely low level of missing data in the 1990 PES and that its impact on the PES estimates was small. Tr. 649, 1338, 1561-1562.

The Bureau used expert rematching to test the quality of clerical matching in the production PES. The Bureau's study—PES Evaluation Project P7—showed that matching error in the PES was not a serious source of bias and was accurately measured. PX 540A.7; Tr. 649-650. Together, the problems of missing data and matching error had been the major technical problems that had confronted the 1980 PEP.

Other, less problematic sources of potential error were also closely monitored. Evaluation Project P4 explored misreporting of census day address, typically a problem for respondents who have moved between Census Day and the day of the PES interview, and found that the impact of aggregate error attributable to misreporting on the overall PES was insignificant. PX 540A.4. Fabrications were found to be minimal in Project 5a, which was designed to explore the rate of fabrications in the PES through evaluation follow-up of a large sample of PES blocks. PX 540A.5a. The effect of errors in classifying erroneous enumerations in the E-sample was examined in Project P9a, which used follow-up reinterviews and also led to the conclusion that error from that source was of minimal consequence. PX 540A.9a. Project P11 confirmed that the selection of matched sets of E-sample and P-sample blocks with comparable search areas for matches of cases had controlled error relating to balancing of the P- and E-samples. PX 540A.11.

Unlike other errors, correlation bias cannot be measured directly. But the Bureau's design of the PES controlled correlation bias by ensuring that it could affect the PES in only one way—*by leading to an underestimation of the extent of undercount*. The Bureau also designed the PES to reduce

correlation bias through post-stratification. Project P12 analyzed the success of the post-stratification in achieving a reduction in correlation bias. PX 540A.12. Based on the results of Project P12, the Bureau concluded that the post-stratification had been effective. PX 55 at 17-19.[12]

The final source of error affecting the PES figures is random (sampling) error. Because it is based on a sample, the PES is inevitably affected by sampling error, but the effect of that source of error is reduced by smoothing. Tr. 514-515, 813-817.

The Bureau accumulated the measurements of PES error into a single "total error model." PX 540A.16. The Bureau was then in a position to gauge the combined effects of all PES errors, including both bias (systematic, or non-random, error) and variance (non-systematic, or random, error), on the accuracy of the population figures generated by the dual

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[12] Summarizing the Bureau's findings, Director Bryant wrote: "[The p]rofessional judgment of the majority of the Census Bureau's Undercount Steering Committee is that the probability of having been counted or not in the census is sufficiently homogeneous among block parts [the relevant unit of analysis for Project P-12] within post-strata to support adjustment." Jt. App. 85-86. The United States says, U.S. Br. 13, that in Project P-12 the Bureau found (in the Secretary's interpretation) "significant *heterogeneity* by state within post-stratum for well over 80% of the post-stratum groups." Pet. App. 207 (italics in original document but not reproduced in cited source). Project P-12 comprised three parts, of which the latter two are relevant here. Part two, on which the Bureau principally relied, Jt. App. 85, did *not* show significant heterogeneity, as the Secretary conceded, Pet. App. 206. Part three, designed for other purposes, involved a sample so large that, as the authors of the study point out, "trivial difference[s] will be [statistically] significant." PX 540A.12 at 2. The *significance* of the heterogeneity found in part three is *statistical significance*, which refers to the confidence with which one has estimated a phenomenon, not the size of the phenomenon: in other words, the Bureau was very confident that the heterogeneity found actually existed, but was also very confident that it was trivial.

system estimate and to compare those effects with the distortions attributable to the bias involved in the uncorrected enumeration. PX 55 at 12. The particular statistical format for making that comparison is a loss function analysis. Tr. 596-597, 925-927, 946-948.

Loss function analysis is based on the measurement of error in the uncorrected census by the PES and the measurement of error in the PES-based figures by the PES evaluation projects. Jt. App. 81. The PES results demonstrated the existence of pervasive biases in the uncorrected census. The PES results show that the census undercounts minorities far more severely than whites, and the total error model shows that correcting for the biases found in the PES figures does not seriously change that outcome. PX 540A.16. Loss function analysis confirms that, as the PES and P-Project results indicate, the adjusted counts do in fact achieve greater accuracy. Jt. App. 83.

The Bureau conducted a series of loss function analyses. In most instances, the Bureau was interested in, and its loss function analyses focused on, the proportional (rather than numeric) accuracy of counts for areas, although the Bureau did calculate numeric loss functions as well. In a series of loss functions, the Bureau calculated loss using squared and absolute[13] error, both for states and for a variety of different levels of jurisdictions and geography. The Bureau also calculated loss functions for the apportionment of the House of Representatives. Tr. 936. Every loss function performed by the Bureau has shown that the adjusted counts are expected

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[13] In raw calculation, loss is expressed with a positive or a negative sign. To aggregate loss, and prevent losses in opposite directions from cancelling, the absolute value (disregarding sign) may be used, or loss may be squared (resulting in a positive sign). Squaring emphasizes the effects of large errors. Tr. 936.

to have significantly less loss than do the unadjusted counts. Tr. 949, 969-970.

In the penultimate loss function analysis completed by the Bureau before the Secretary's decision on adjustment, the ratio of squared error loss for the unadjusted counts to squared error loss for the adjusted counts is at least ten to one. Tr. 950-951; PX 43 at 11290. In that loss function, the adjusted counts have substantially less loss for all levels of aggregation and geography—counties of 500,000 or more; counties of 200,000 or more; counties of less than 200,000; non-metropolitan areas in counties of less than 200,000; metropolitan areas in counties of less than 200,000; metropolitan areas in counties of 500,000 or more; metropolitan areas in counties of 200,000 or more; non-metropolitan areas in places of 25,000 to 49,999; non-metropolitan areas in places of less than 25,000; metropolitan areas in places of 500,000 or more; metropolitan areas in places of 50,000 or more; metropolitan areas in places of 25,000 to 49,999; and metropolitan areas in places of 25,000—with a single exception. The exception—the only areas for which that loss function analysis shows the unadjusted counts more accurate—is non-metropolitan areas in places of more than 50,000. There are five such places in the United States, and they contain 60,000 people in total. Tr. 957-959; PX 43 at 11294-11295.

A subsequent loss function analysis, the last completed by the Bureau before the Secretary's decision, reflects, even more starkly, the same pattern. PX 42. The analysis calculates both squared and absolute errors. The squared error loss function shows a ratio of greater loss from unadjusted counts than from the adjusted counts of at least twelve to one; the absolute loss function shows a ratio of three to one. Tr. 969-970; PX 42 at 6087, 6090. The final loss function analysis also shows that the unadjusted counts are expected, approximately, to malapportion two more seats in the House

of Representatives than are the adjusted counts. Tr. 968; PX 42 at 6086.

In their technical assessment of the accuracy of the adjusted and unadjusted counts, seven of the nine members of the Undercount Steering Committee concluded that the adjusted counts were more accurate than the unadjusted and that the census should be corrected on the basis of the PES. PX 54 at 1-2. Two members of the Undercount Steering Committee dissented, concluding that the adjusted counts had been shown to be more accurate only for certain purposes and for certain groups (and to that extent the minority joined in the conclusion that adjustment would be proper for those purposes and groups) but that additional study would be necessary to determine whether adjustment represented an overall improvement. PX 54 at 1-2. On June 28, 1991, Dr. Bryant transmitted to Secretary Mosbacher the recommendation of the Bureau that the 1990 census should be statistically adjusted on the basis of the PES to correct for the differential undercount. Summarizing the Bureau's position, Dr. Bryant wrote:

> "The PES, supported by Demographic Analysis, estimates that the resident population of the United States on April 1, 1990 was approximately 5.3 million greater than was counted in the census. The fact that both these Census Bureau research projects, including the one based on administrative records rather than census data, produce nearly the same 5 million number is strong evidence that these residents of the United States exist. Logic also supports the existence of people who cannot or will not be counted, although logic cannot confirm their numbers. In my opinion, not adjusting would be denying that these 5 million persons exist. That denial would be a greater inaccuracy than any inaccuracies that adjustment may introduce."

Jt. App. 84.[14]

C. The Secretary's Decision

1. On July 15, 1991, the Secretary rejected the Bureau's findings and the Director's recommendation and announced his decision against adjustment. The Secretary acknowledged that the unadjusted counts were affected by a substantial undercount, differential by race and ethnic origin, which adjustment would correct. Pet. App. 138-139, 200. He acknowledged too that the Bureau's analyses showed adjustment would improve numeric accuracy (absolute numbers) for States and local areas, Pet. App. 147, 184-185, 201,[15] and would improve distributive accuracy (proportional numbers) for places containing two-thirds of the national

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[14] Petitioners point out that in 1992 the Bureau revised the PES-based adjusted counts. U.S. Br. 18, Wisc. Br. 11. The revision lowered the estimate of overall national undercount from 2.08% to 1.58%. After explaining the 1992 revision, Director Bryant writes:

> If [Secretary] Mosbacher had decided to adjust the census on [July 15, 1991], these errors meant that we would have added slightly more people to the population than we should have. But even so, the adjusted numbers would have been closer than the census count to our best estimate of the "true" population in an environment where "truth" can never be precisely determined.

B. Bryant, *Moving Power and Money: The Politics of Census Taking* 165 (1995). The revision actually shows the differential undercount to have been *worse* than found in the 1991 PES figures. While the overall national undercount rate was reduced by .50%, the undercount rate for non-blacks dropped by .51%, the undercount rate for blacks by .39%, and the undercount rate for Hispanics by .28%. Thus the black/non-black differential went up .12, and the differential between the Hispanic and overall national undercount rates went up .22. *Id.* 164.

[15] The Secretary cautioned that, in his view, that conclusion "ha[d] not been definitively demonstrated." Pet. App. 201.

population, Pet. App. 141-142.[16] He conceded "the census' imperfections", Pet. App. 165, and "[t]he fact that the PES was generally a high quality survey", Pet. App. 181.

2. The Secretary reported a "diversity of opinion among my advisors." Pet. App. 140. He noted that "[t]he Special Advisory Panel split evenly as to whether there was convincing evidence that the adjusted counts were more accurate." *Ibid.* The Secretary did not explain that the Bureau's Director had recommended adjustment, that a majority of the Undercount Steering Committee had agreed that the adjusted data were more accurate nationally and at all levels and that even the committee's two dissenters favored *some* adjustment.

Nor did the Secretary explain that the four-four split in the Special Advisory Panel reflected the circumstances of its creation: the four members nominated by plaintiffs, including Dr. Wolter (who had opposed adjustment in 1980), recommended adjustment; the four members selected by the Secretary recommended against. One of the Secretary's four appointees, William Kruskal, later explained that the Secretary had chosen "people who were known to tilt against" adjustment and that the eventual four-four split was "in the

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[16] The United States attempts to retract the Secretary's concession with the argument that the two-thirds figure was based on an early Bureau estimate subsequently corrected to take into account an assumed increase in the variance of the PES. Thus, the United States writes, "the original loss function analysis substantially overstated the accuracy of the adjusted data." U.S. Br. 32 n.24. That is not so. High relative under- and overcounts were concentrated disproportionately in large States, notably California and Texas. Assuming an increased variance, as the Bureau did, left unaffected the conclusion that the corrected counts were substantially more accurate than the uncorrected. Deposition of Howard Hogan ("Hogan Dep.") 395-396; PX 643. The Undercount Steering Committee, PX 54, Addendum at 4; DX 1 at 915, explained to the Secretary *both* their tests of increased variance *and* their explanation that those tests continued to show the superior accuracy of the adjusted counts.

cards" from the Panel's inception, Deposition of William Kruskal, at 39-40. Another, Michael McGehee, had noted to his three co-nominees, early in the Panel's existence, that they were working for the "cause against adjustment," PX 240. The Panel member upon whose work the Secretary most heavily relied was Kenneth W. Wachter.[17] Dr. Wachter's nomination was recommended by a faculty colleague, David Freedman, who had been hired by the Department as a consultant in the spring of 1989 and who continued to advise

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[17] In his decision against adjustment the Secretary repeatedly rejected as unconvincing the Bureau's own analyses of the PES and the adjusted figures and found persuasive analyses performed by Dr. Wachter, whose work was conducted without contribution from or guidance or review by the Bureau. Tr. 1852-1853; Deposition of Charles D. Jones 185-186; Hogan Dep. 152. When Dr. Wachter speculated that adult black males missed by both the unadjusted census and the PES might be located in parts of the country other than those in which the PES had found high undercounts of adult black males (central cities across the nation and the rural South), the Secretary found that speculation more plausible than the Bureau's assumption that the missing adult black males were located in the same areas as adult black males who *had* been counted. Pet. App. 160-162. To the Secretary's mind, the Bureau's extensive analyses of the effects of missing data on the PES proved less compelling than Dr. Wachter's demonstration that less plausible assumptions than the Bureau made would have yielded different results. Pet. App. 170-171. The Bureau's two evaluation projects that analyzed heterogeneity were deemed irrelevant; only experiments conducted by Dr. Wachter with the assistance of a single graduate student, Tr. 2216-2222, provided what the Secretary considered probative evidence on the question of heterogeneity. Pet. App. 211. The Bureau's analyses of the effects of imputation in the PES yielded to another test run by Dr. Wachter. Pet. App. 218. The Bureau's development of smoothing was called into question by "serious concerns" raised by Dr. Wachter. Pet. App. 222, 226. Where Dr. Wachter and the Bureau's Director disagreed about the effects of adjustment on future census participation, Dr. Wachter's views were accepted, the Director's were "unpersuasive." Pet. App. 234. At every point, Dr. Wachter provided findings that contradicted the Bureau's own and were interpreted by Dr. Wachter and the Secretary as raising doubts about the adjustment process.

the Department through the trial of this action. Tr. 2345, 2466, 2469.[18]

3. In his decision, the Secretary devoted the bulk of his attention to guideline one. In discussing that guideline, the Secretary made three critical choices, all of them reflected but not all of them explicated in his decision. First, he decided that evidence of numeric accuracy was "not relevant" to the adjustment decision; second, he considered comparisons of the distributive accuracy of the unadjusted and the adjusted counts without regard to whether the comparisons bore on actual uses of census data; third, in making those comparisons, he treated every error as equivalent, regardless of the size of the error.

The Secretary stressed his choice of distributive rather than numeric accuracy as a critical factor in his decision, Pet. App. 182-184; in fact, that was not a point in controversy.[19]

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[18] Assuming *arguendo* that plaintiffs' nominees were just as close-minded as the Secretary's, it is still the case that the Secretary failed to explain why a deadlock that was preordained had any bearing on the merits of his decision.

[19] Only after it became apparent that a PES-based adjustment would improve numeric accuracy did the Department of Commerce announce that distributive accuracy was both central to the adjustment question and unrelated to numeric accuracy. In the press release that supplies the only articulation of its 1987 decision against adjustment, the Department did not contend that adjustment might degrade distributive accuracy—only that the unadjusted census was expect to achieve such a high level of *numeric* accuracy that adjustment would be unnecessary. PX 475. When the Department published the guidelines in 1990, it still had not discovered the centrality of distributive accuracy: not only is there no reference to distributive accuracy in the guidelines or their explanations, but the explanation accompanying guideline one requires a comparison of the accuracy of the adjusted and unadjusted counts at, *inter alia*, the national level. Pet. App. 152. Comparison at the national level is, of course, a comparison of the respective numeric accuracy of the two counts—the very comparison that the Secretary the following year found to be "not relevant" to the decision on adjustment. Pet. App. 184, 201.

The Bureau's long-standing concern with differential undercount, the concern that had actuated development and implementation of the PES and that informed the Bureau's preference for the corrected data, was a concern that the uncorrected counts led to misallocation of representation and funding. Jt. App. 79. Thus, the Bureau's fundamental concern was with distributive accuracy. Moreover, the Bureau presented its conclusion that the adjusted counts achieved superior accuracy in terms of both numeric and distributive improvement. Jt. App. 80. But the Bureau regarded evidence of improved numeric accuracy as bearing on the question of improved distributive accuracy; the Secretary, by contrast, regarded evidence of superior numeric accuracy as "not relevant" to the determination of distributive accuracy. Pet. App. 201. The Secretary's decision, which represents the only time that a decision about how best to achieve an accurate census has been removed from the Bureau, also represents the only time that decision has been made without regard for numeric accuracy. Every other decision made to improve the accuracy of the counts—including all of the methodological innovations discussed above—has been justified by the Bureau in terms of increased numeric accuracy. That approach does not mean that the Bureau rejects the distributive accuracy of the census as the ultimate criterion of improvement. Rather, the Bureau has chosen to introduce innovations to maximize numeric accuracy because it has always recognized that improving numeric accuracy is the clearest way to improve distributive accuracy. A census that achieves perfect numeric accuracy also achieves perfect distributive accuracy.

Distributive accuracy involves comparing the relative accuracy of the census count for different areas. It makes sense as a concept separate and apart from numeric accuracy only if comparisons are made that are related to the uses of census data—for determining apportionment, intra-state redistricting and the allocation of federal funds. While the

Secretary asserted that he was focusing on distributive accuracy because he was concerned with the uses of census data, his approach to distributive accuracy was unrelated to those uses. The Secretary considered whether improved distributive accuracy had been definitively demonstrated for groups of places, regardless of whether those places compete directly for representation, funding or anything else. For example, the Secretary cited the results of a Bureau loss function analysis of distributive accuracy for the 23 cities in metropolitan areas of 500,000 or more. Pet. App. 191. That analysis examines gains and losses for the cities in terms of their shares of the national population residing in those 23 cities. The question addressed by the analysis is *not* the same as the question of whether each city showed improved distributive accuracy *vis-a-vis* the national population or improved distributive accuracy *vis-a-vis* the State of which it is a part, analyses intimately connected to the issues of representation and funding. The Secretary's focus was on the question of whether, for example, Chicago's population was being counted more accurately just in comparison to places such as Los Angeles and San Diego, a comparison with no relevance whatsoever to any constitutional or statutory use of the census; the Secretary was ignoring the increased accuracy of Chicago's population as a share of the national total and a share of Illinois.

In the same vein, the Secretary relied on what he termed an absence of "direct evidence" for improvement of distributive accuracy with respect to places of under 100,000 population. Pet. App. 192. Those analyses would have compared places of under 100,000 population with one another—not with the national population, nor with the States of which the places are parts. In practical terms, the Secretary decided that evidence of improved accuracy for White Plains, N.Y. *vis-a-vis* Ashtabula or Sioux City was more important than evidence of improved accuracy for White Plains as a part of the nation or as a part of New York State. And again, no

constitutional or statutory justification for that preference was, or could have been, offered.

In his approach to distributive accuracy, the Secretary also disregarded the sizes of errors; thus, in the Secretary's analysis, large gains in accuracy (with significant practical consequences) could be offset by small losses in accuracy (with little or no practical significance). Tr. 1002, 1071; Hogan Dep. 258-259. Bureau analyses had demonstrated that adjustment would have the greatest impact and would do the most good in States with especially high undercounts, such as California, or especially low undercounts, such as Wisconsin. Tr. 1012-1014. For those states where the results of adjustment would be less certain to increase distributive accuracy—states with average undercounts—the impact of adjustment on apportionment, redistricting and funding would be minimal. *Ibid.* The Bureau's loss function analyses, like the rest of its work, had focused on aggregate loss, giving more weight to proportionally large errors than to proportionally small ones. PX 54; PX 643; Tr. 1075; Hogan Dep. 395-396. The Secretary, looking simply at the total number of States, cities or other areas with *any* error, disregarded that approach. Tr. 1000.

Specifically, the Secretary relied on a Bureau loss function analysis that he interpreted as showing that, with an increased estimate of PES sampling error, adjustment would decrease distributive accuracy for 28 or 29 States. Pet. App. 142; PX 54, Addendum at 4. In so doing, he treated all errors as if they were of the same magnitude. Tr. 1000. But many of the states that the Bureau's analysis treated as worsened by adjustment would in fact be virtually unaffected: adjustment would have changed their shares of the national population too little for any practical impact in terms of representation, funding or anything else. Tr. 1022. The Secretary ignored the Bureau's finding that the places improved by adjustment contained the great majority of the nation's population. *Supra*,

pages 35, 36 & n.16. His approach ignored as well the constitutionally primary purposes of the census and the indisputable improvement in census accuracy adjustment was shown to have for those purposes.

The National Academy of Sciences had explicitly warned against an approach such as the Secretary's, in which the sizes of errors are ignored. PX 2 at 282; *see also* Tr. 767, 1163. In the weeks before his decision the Bureau, addressing the same point, twice cautioned the Secretary that the "[i]ntuition that the break-even point is when half the states [are improved] and half [are worsened] is *not* correct." PX 54, Addendum at 4; *see also* PX 41 at 3217. At trial, Dr. Freedman conceded that the Secretary's approach was "borderline unreasonable". Tr. 2507. On appeal, the United States, citing Dr. Freedman's testimony, admitted that the Secretary's approach was "not a good way" to analyze distributive accuracy. Fed. App. Br. 47 n.16. The same error affects all of the Secretary's conclusions about the Bureau's loss function analyses, including the comparison of the 23 cities in metropolitan areas of more than 500,000 population; the concession that his approach was invalid is a concession that all of his findings concerning the comparative accuracy of the adjusted and unadjusted counts flowed from an invalid approach to comparisons of distributive accuracy.

Although the United States now concedes that "the adjustment was in large part proposed to remedy the disproportionate undercount of minorities", U.S. Br. 17 n.14, the Secretary never acknowledged that that was the purpose for which the PES was conducted nor that it had fulfilled that purpose. By the Secretary's own account, the prospect of ameliorating the differential undercount played little role in his decision.

D. Prior Proceedings

1. Upon announcement of the Secretary's decision, the *City of New York* plaintiffs resumed active litigation, challenging the decision as violative of equal representation rights under the Constitution, Art. I, § 2, cl. 3 (as amended by the Fourteenth Amendment, § 2) and the Fifth Amendment. The culmination of that challenge was a thirteen-day trial. Plaintiffs presented testimony by, among others, the four special advisory panel members they had nominated, including Dr. Wolter, and by Dr. Bailar. Defendants presented testimony by one Bureau statistician, Robert Fay,[20] and one other Bureau employee, Peter Bounpane; the crux of defendants' case, however, was presented by three retained experts, Drs. Freedman, Wachter and Paul Meier.

At the outset of its opinion, after summarizing the evidence of undercount in the uncorrected census and the accuracy of the adjusted data, the district court concluded: "This Court is satisfied that for most purposes the PES resulted in a more accurate—or to be statistically fashionable, a less inaccurate—count than the original census." Pet. App. 59. The court then turned to the question of whether, in

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[20] The focus of Dr. Fay's testimony was his account of a paper he was then writing in which he argued the variance of the adjusted census counts might be twice what the Bureau had estimated in June 1991. Tr. 1915. But the Bureau had taken that possibility into account in reaching its conclusion that the adjusted counts were more accurate. PX 54 at 6-7, App. 6 at 5. Loss function analysis demonstrates that, even if one assumes the levels of variance proposed by Dr. Fay, the adjusted counts are much more accurate than the unadjusted. Tr. 1019-1021. Dr. Fay's more general point, as implied by the United States' summary that he "no longer advocated *the adjustment recommended by the Committee*", U.S. Br. 38 (citing Tr. 1920-1921) (emphasis supplied), was that, after an additional year of research, he believed other adjustments of greater accuracy could be made.

light of that finding, the Secretary's decision might nonetheless be upheld.

At the heart of the district court's decision lie a pair of determinations, the joint effect of which was to accord the Secretary a double measure of deference. First, the court deemed itself empowered to review the Secretary's decision only to the extent of determining whether the Secretary had been arbitrary or capricious. Pet. App. 89-91. Citing the writings of Montesquieu and Locke, the Massachusetts Constitution of 1780 and *The Federalist* No. 72 (Hamilton), the court found that a proper concern for the separation of powers dictated a limited "role [for] the judiciary . . . when the controversy relate[s] to the management of the government." Pet. App. 89. The court implicitly found that "judicial intrusion" in such a controversy is available only under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and then only "when the administrative decision abuses reason." Pet. App. 90; *see also* Pet. App. 69. Second, the court tested the reasonableness of the Secretary's decision only in terms of his application of the guidelines. In discussing each of respondents' objections to the decision, the court examined only whether the Secretary had reasonably applied a guideline to support his conclusion. Pet. App. 71-89. The court did not consider whether the Secretary's decision was arbitrary or capricious other than as an application of the guidelines, nor did the court consider whether the Secretary's decision (whether viewed as an application of the guidelines or otherwise) was constitutional.

Indeed, although the district court discussed the Constitution preliminarily as the source of the requirement that "the census . . . be as accurate as practicable", Pet. App. 67, the court did not thereafter refer to the Constitution, with two minor exceptions: first, the court concluded that "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal

of assuring the most accurate census practicable", Pet. App. 77; second, the court summarily stated: "I . . . find that the Secretary's decision not to adjust the 1990 census does not violate the APA, the Constitution, the [1989] Stipulation, or any statute", Pet. App. 94. No further analysis or reference supported that summary statement.

Given its conclusions regarding the deference to be accorded the Secretary, the court determined that his rejection of adjustment was entitled to be upheld, despite the court's own conclusion that adjustment would improve the accuracy of the census. The court explained the connection between the standard of review it adopted and the result it reached:

> "The breadth of the guidelines left the Secretary enormous discretion. Plaintiffs have made a powerful case that discretion would have been more wisely employed in favor of adjustment. Indeed, were this Court called upon to decide this issue *de novo,* I would probably have ordered the adjustment. However, it is not within my province to make such determinations. The question is whether the Secretary's decision not to adjust is so beyond the pale of reason as to be arbitrary or capricious. That far I cannot go."

Pet. App. 89 (footnote omitted). The court reiterated later: "While plaintiffs' counsel has illustrated that adjustment is statistically feasible, and would improve the quality of the counts for most purposes while ameliorating the profoundly disturbing problem of differential undercount, the Court cannot, on the record before it, supplant the Secretary's decision." Pet. App. 94-95. And the court observed that "plaintiffs have made a compelling attack on the [Secretary's] *Decision*, and the Secretary has conceded that the objective criteria used to measure the adjusted counts show a greater numeric accuracy at the national level and that the Census

Bureau estimates of distributive accuracy marginally favor the adjusted counts . . ." Pet. App. 77.[21]

No fair reading of the court's opinion supports the United States' statement that the district court's decision was "enigmatic" in its findings on the relative accuracy of the two counts. U.S. Br. 44. The United States has extracted from its context the second of two sentences from the opinion. The district court wrote:

> "Plaintiffs' attack on the Secretary for subjecting the tests favoring adjustment to unrealistically rigorous scrutiny misconstrues Guideline One, which clearly states that '[t]he Census shall be considered the most accurate count of the population of the United States, at the national, state, *and local levels, unless an adjusted count is shown to be more accurate.*' [Citation omitted.] Thus, plaintiffs' failure to illustrate affirmatively the superior accuracy of the adjusted counts either (1) at any level mentioned in Guideline One, or (2) for any reasonable definition of accuracy, is sufficient to support a finding that Guideline One favors use of the original census counts."

Pet. App. 78 (emphasis supplied by the district court in its 1993 opinion). The court's point was that guideline one required an affirmative showing of superior accuracy of the adjusted counts at every level and for every reasonable definition of accuracy; if plaintiffs failed at any hurdle, their success in passing all the others would be insufficient to save their cause. The court was not saying, as the United States'

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[21] It is clear in context that the district court did not endorse the Secretary's conclusion that the Bureau's estimates of distributive accuracy only *marginally* favored the adjusted counts; the court was describing the extent of the Secretary's concession. It is also clear that that concession was made even after taking into consideration a higher estimate of variance in the PES than originally assumed by the Bureau. *See* Pet. App. 74.

selective quotation of only the last sentence of that paragraph is meant to suggest, that there was no level and no definition of accuracy for which plaintiffs had proved the superior accuracy of the adjusted counts. On the contrary, the court had already explained that it was satisfied adjustment would improve the accuracy of the census counts "for most purposes."

The court's conclusion that guideline one supported the Secretary's decision rested on two elements of that guideline: its presumption against adjustment, and its requirement of demonstrated increases in accuracy at local levels. The latter element, as the court understood it, meant that the Secretary could properly focus attention on the absence of "direct evidence," as he saw it, for improved distributive accuracy for places of under 100,000 in population, *regardless of whether that analysis had any bearing on the constitutional uses of census data.* The presumption, in turn, meant that, even if the weight of the evidence demonstrated affirmatively that adjustment would otherwise improve distributive accuracy, the Secretary's residual uncertainty about any aspect of the comparison between the adjusted and the unadjusted counts was a sufficient basis for his conclusion that the unadjusted counts were more accurate.

In short, the court found that the adjusted counts were more accurate but determined that the Secretary's decision against adjustment nonetheless constituted a non-arbitrary application of the Secretary's own guidelines.

2. On appeal, plaintiffs argued that the district court had adopted the wrong standard for review of the Secretary's decision. Plaintiffs contended that the Secretary's decision affected constitutional rights, because the differential undercount had been shown to result in a malapportionment of the House of Representatives and to affect intra-state redistricting, and that the district court's deferential review of the decision was therefore erroneous.

The court of appeals agreed with plaintiffs that the lower court had erred in the deference it accorded the Secretary. The court of appeals reasoned that, since plaintiffs had shown that the adjusted data are more accurate and that the failure to correct therefore deprives citizens of equal votes by diluting the voting strength of residents of areas with high undercount, the Secretary's decision was to be reviewed under a line of analysis that begins with *Baker v. Carr*, 369 U.S. 186 (1962), and continues through *Karcher v. Daggett*, 462 U.S. 725 (1983). Pet. App. 26-31. That line of cases, according to the court of appeals, (1) requires that, as near as practicable, one person's vote must be worth as much as another's; (2) holds that the right to vote is impaired by dilution as well as by complete disenfranchisement; and (3) imposes upon *States* the obligation to make a good-faith effort to achieve the goal of one person, one vote. Pet. App. 31. The court of appeals concluded that the same reasoning applies, *mutatis mutandis*, to *federal* decisions bearing on equality of representation. Because of separation of powers considerations, the court of appeals determined, *de novo* review would be inappropriate. Pet. App. 34. And because of constitutional constraints, precise equality of populations in congressional districts cannot be maintained across state lines. Nonetheless, the court of appeals reasoned that recent decisions of this Court, including *United States Department of Commerce v. Montana*, 503 U.S. 442, 463-464 (1992), and *Franklin v. Massachusetts*, 505 U.S. 788, ___, 112 S.Ct. 2767, 2777 (1992), teach that a good-faith effort to achieve equality of voting power as nearly as is practicable is required of federal officials in the discharge of responsibilities to conduct and report the census. Pet. App. 34-35.

Applying *Karcher*, the court of appeals held that the burden was initially on plaintiffs to show that the Secretary had failed to make a good-faith effort to achieve a census as accurate as practicable. Pet. App. 36-37. The court held that plaintiffs had met that burden by demonstrating that the

adjusted counts were more accurate, especially with respect to alleviating the differential undercount of minorities, and by showing that the Secretary had declined to adopt the more accurate adjusted counts because he remained uncertain about distributive accuracy at some smaller geographic levels. Pet. App. 38-39.

Following *Karcher*, 462 U.S. at 740, the court of appeals concluded that plaintiffs' proof sufficed to shift the burden to the Secretary to show that use of the less accurate unadjusted census data "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." Pet. App. 37, 40. The court of appeals remanded the case to permit the Secretary to essay that demonstration.

SUMMARY OF ARGUMENT

Petitioners argue that the court of appeals erred in analyzing the case as one involving fundamental constitutional rights and in following *Karcher* and its antecedents to establish a framework for analysis; petitioners all believe that this case ought properly be analyzed under *Franklin* to determine whether the Secretary's decision was "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 112 S.Ct. at 2777. *See* U.S. Br. 28-32, Wisc. Br. 18-21, 45-46, Okla. Br. i. While the court of appeals was correct, its choice has none of the consequences petitioners suppose; application of the *Franklin* standard leads to the same result as that reached by the court of appeals.

1. The Secretary's decision cannot be justified as "consistent with . . . the constitutional goal of equal representation." In determining which set of census data was more accurate, the Secretary ignored evidence that the adjusted data achieved superior numeric accuracy as irrelevant to the question before him, even though the superior numeric accuracy of the adjusted counts is related, as the Bureau

concluded, to the counts' superior distributive accuracy. The Secretary selected for his comparisons the criterion of distributive accuracy, a selection based on his concerns about the uses of the census data, but he then applied that criterion in ways having nothing to do with uses of the data. He emphasized comparisons having no justification in any constitutional or statutory purpose for which the census is conducted; he treated small errors having little or no impact on those uses as the equivalent of large errors having considerable impact on those uses. After all of those maneuvers, the Secretary achieved a quantum of doubt about the superior distributive accuracy—a quantum that, though unrelated to any uses of census data, allowed the Secretary to invoke the presumption of guideline one and declare the unadjusted counts to be of superior accuracy at all geographic levels and for all purposes. That approach to resolving the question of how best to maximize census accuracy is entirely different from an approach that, without presumptions or artificial analyses or comparisons unrelated to uses of the data, seeks to determine which set of data is more accurate for the purposes for which census data are used. When the district court undertook the latter inquiry, it had no difficulty concluding, as did the Bureau, that the adjusted data were more accurate. The Secretary's contrary approach cannot satisfy the obligation imposed on him by *Franklin*.

2. The court of appeals' analysis leads to the same result. *Karcher* and its antecedents define an obligation of good-faith effort to achieve equality of voting power that the Constitution imposes upon State and local officials. *Montana* supports application of that same obligation to federal actors, though absolute equality of representation between States is precluded by constitutional barriers. The analytic framework of *Karcher* applies to this case. As the court of appeals determined, plaintiffs have shown that the Secretary's decision reflected the absence of a good-faith effort to achieve equality as nearly as practicable. The United States' contention that the

Secretary proceeded in good faith rests on the assumption that the Secretary's decision can be understood as a neutral finding, free of presumptions or artificial analysis, that the unadjusted counts are more accurate for the purposes for which census data are used. The assumption cannot be supported. Moreover, the absence of good faith is readily shown by the context and content of the Secretary's decision.

ARGUMENT

I. THE SECRETARY'S DECISION IS NOT CONSISTENT WITH THE CONSTITUTIONAL LANGUAGE AND THE CONSTITUTIONAL GOAL OF EQUAL REPRESENTATION

The United States asserts that "[t]he Secretary's decision not to undertake an adjustment of the 1990 census figures rested primarily on three determinations[: (1)] . . . that distributive rather than total numeric accuracy should be of paramount importance . . . [; (2)] that, in making his decision, the unadjusted census figures would 'be considered the most accurate count of the population of the United States, at the national, State, and local level, unless an adjusted count is shown to be more accurate.'[; and (3)] that the adjusted figures had not been shown to improve distributive accuracy and that adjustment was therefore not warranted." U.S. Br. 28-29 (footnote omitted). The United States further contends that "[t]he first two determinations are matters of policy that a court may review to the extent of determining whether they are 'consistent with the constitutional language and the constitutional goal of equal representation.'" U.S. Br. 29 (quoting *Franklin*, 112 S.Ct. at 2227). The third determination, according to the United States, "is an exercise of technical judgment . . . reviewable, if at all, only under a deferential 'rational basis' or 'arbitrary and capricious' standard.'" U.S. Br. 29 (footnote omitted).

1. The claim that the Secretary made a critical determination when he selected distributive, rather than numeric, accuracy as the ultimate criterion for deciding whether the census should be adjusted is insupportable. Both the Bureau, which addressed the question of differential undercount because of concerns about its effect on distributive accuracy, and the Secretary (and, for that matter, everyone else who has ever considered the question of census accuracy) agreed that *ultimately* distributive accuracy is the goal of the census. The novelty—and the determinative core—of the Secretary's decision lies elsewhere. That decision rests on the assumption that evidence of improved numeric accuracy is *irrelevant* to determining whether distributive accuracy has been improved and on an approach to resolving questions of distributive accuracy that examines all possible comparisons, regardless of relation to uses of census data, and measures error by the number of units affected rather than the proportional sizes of the errors. The determination that numeric accuracy is irrelevant is without precedent in the history of the census.[22] Moreover, it cannot be justified as

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[22] The notion that only distributive accuracy is important and that numeric accuracy is irrelevant is so strange that the advocates who press it before this Court find it impossible to avoid contradicting themselves. The United States says, "Even a dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined." U.S. Br. 30-31. In the same vein, Wisconsin writes:

> A census which achieves "true" numeric accuracy in the count of the national population has no inherent superiority over one which does not. What makes one set of numbers constitutionally superior is its ability to distribute correctly a given national population among the states. If this occurs, it is constitutionally irrelevant whether the national count is half or double its "true" level or somewhere in between.

Wisc. Br. 36. Yet both petitioners find highly relevant the Bureau's "success in counting 98.4% of the population", U.S. Br. 23; *see also* Wisc.

"consonant with, though not dictated by, the text and history of the Constitution," *Franklin*, 112 S.Ct. at 2778, *cf.* U.S. Br. 29 n.21, for the Secretary's indifference to numeric accuracy transgresses both the plain language of the Constitution, Art. I, 2, § Cl. 3, and the mechanism for representation to which that language relates.[23] The Secretary's determination of an

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Br. 5. If numeric accuracy is presumptively "constitutionally irrelevant," as petitioners claim, a count of 98.4% of the population is not presumptively "constitutionally superior" to a count of 50% or 200% of the national population. Obviously, neither petitioner really believes that numeric accuracy is completely irrelevant, and indeed it is not.

[23] The Secretary's indifference to numeric accuracy rests on the premise that "[e]ven a dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined." U.S. Br. 30-31. Wisconsin puts it only slightly differently, "The same percentage distribution of the national population among the states will result in the same apportionment, regardless of the level of the national population." Wisc. Br. 36. Neither statement is true as a general proposition; neither reckons with the facts that the Constitution, Art. I, § 2, Cl. 3, requires that congressional districts have populations of no less than 30,000; that it requires that whole numbers of seats be apportioned; and that it does not express a preference for a particular method of apportionment. Thus, neither statement holds for the results of the first decennial census in 1790 and the first census-based apportionment in 1792. At that time, congressional districts close in size to the constitutional minimum (30,000) were common. For example, Rhode Island, with a population of 68,446, received two seats in the House of Representatives. *See* M. Balinski & H. Young, *Fair Representation* 158 (1982). A more severe, though evenly distributed undercount—of 13% or more—would have reduced Rhode Island's population below 60,000 and necessarily eliminated its second seat. But under the method of apportionment actually used, *see Montana*, 503 U.S. at 448-450, larger states' congressional delegations would not have been halved. New Jersey, with a population of 179,570, received five seats in the 1792 apportionment. Had an evenly distributed undercount reduced Rhode Island to one seat, no method of apportionment could have preserved the 5:2 ratio between New Jersey's and Rhode Island's delegations, since the Constitution requires allocation of whole numbers of seats. Finally, the 1792 apportionment was conducted under Jefferson's

approach to analyzing distributive accuracy is so extraordinary that it was repudiated by the United States in the court of appeals.

Distributive accuracy is an appropriate criterion for judging census accuracy because it calls attention to a concern with the uses to which census data are put. The Secretary himself invoked that justification in explaining his preference for distributive accuracy. But the Secretary's ensuing analyses of "distributive accuracy" are unrelated to any uses of census data. Nowhere in his decision does the Secretary even attempt to demonstrate that the errors created by adjustment would have adversely affected the *usefulness* of census data. In particular, the Secretary never considered which set of counts would do most to ensure fair representation. The Secretary's determination of an approach to the question of distributive accuracy—an approach conceded not to have been valid—cannot be vindicated as consistent with the constitutional goal of equal representation.

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method (the method of greatest divisors): under that method, a common divisor is first selected (in 1792, the divisor was 33,000); then, each State's enumerated population is divided by the divisor and each State's number of Representatives is the resulting whole number, fractions being ignored, *id.* at 449-450. A State would thus have eight seats if the ratio of its reported population to the selected divisor were anywhere between 8.99 and 8.00, but would fall to seven seats if the ratio dropped from 8.00 to 7.99. With the same divisor, then, a *modest*, evenly distributed undercount could alter the apportionment of seats in the House. Only under a method of apportionment such as the method of equal proportions (Hill method) is it true (and then only for congressional districts much larger than 30,000) that an evenly distributed undercount will not change the apportionment of Representatives. But that method is only one of several Congress has from time to time selected. *Id.* at 447-456. The Secretary's determination that numeric accuracy is irrelevant because equivalent distributions *always* produce the same apportionment rests on a supposed axiom about constitutional apportionment that is in fact not generally true; the Secretary's determination is not "consonant with . . . the text and history of the Constitution."

2. The Secretary's second determination, according to the United States, was to "adopt[] a working hypothesis that unadjusted figures derived from the 1990 census would be treated as the most accurate unless alternative numbers were shown to be better." U.S. Br. 31-32. The United States, *id.* 31, argues that use of that hypothesis was "consonant with, though not dictated by, the text and history of the Constitution," *Franklin,* 112 S. Ct. at 2778, "[b]ecause unadjusted headcounts had been used for 200 years". The premise of the argument is simply wrong, *supra*, pages 4-5. In any event, the census is a complex system of balancing errors that cannot meaningfully be described as a "headcount." *Supra*, pages 5-11. Moreover, what the United States must defend is not merely a presumption that the uncorrected counts are more accurate but a presumption that incorporates the Secretary's approach to distributive accuracy —and that approach is without precedent in the 200 years of the United States census, was described by the Secretary's own expert witness at trial as "borderline unreasonable," and has been deprecated by even the United States as "not a good way" of analyzing accuracy.

The United States makes two further points in connection with the Secretary's "second determination." The United States argues that the "constitutional goal of equal representation" cannot "plausibly be thought to require the Secretary to use adjusted figures that he had not found to be more accurate than the unadjusted numbers in achieving that goal." U.S. Br. 32. But the Secretary never considered analyses bearing on the superior accuracy of the adjusted counts for apportionment and districting; instead, he focused on applications of the criterion of distributive accuracy that were unrelated to any use of census data. Thus, his analysis ignored the impact of the adjustment decision on the goal of equal representation.

The United States also argues that the Secretary "affirmatively concluded" that "'evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration.'" U.S. Br. 32 (quoting Pet. App. 185). The evidence in question is the same set of analyses for states, cities and counties, Pet. App. 191, already discussed, *supra*, pages 39-42. The Secretary's "affirmative conclu[sion]" can be supported only by adoption of the approach to distributive accuracy he followed. Following any other approach, the Bureau's evidence (as the Bureau explained) supports the superior distributive accuracy of the adjusted counts.

3. The United States contends that the Secretary's "third determination"—that the adjusted data were less accurate than the unadjusted—can be reviewed only under a deferential standard because of the supposedly highly technical nature of the decision. U.S. Br. 33. The United States cites in support of that argument a series of cases restating the courts' customary hesitation to review the merits of agencies' resolutions of scientific disputes. U.S. Br. 34. Without any supportive authority, the United States then announces, "That respondents' attack on the Secretary's decision is framed as a constitutional challenge does not detract from the respect for institutional competence that underlies the rule of deference to an expert agency's technical judgments." *Ibid.*

In the first place, there is nothing highly technical about the critical question of the Secretary's approach to distributive accuracy. The Secretary himself observed that:

> "The choice of a loss function is not scientific. It is usually made on the basis of convenience or tradition."

Pet. App. 188. The United States concedes that the Secretary's choice of an approach to distributive accuracy as the basis for his interpretation of the Bureau's loss function analyses is susceptible to judicial review to determine whether

it is consistent with the constitutional language and the constitutional goal of equal representation. If his approach cannot be so supported, the Secretary's "working hypothesis" concerning the superiority of the unadjusted counts is insufficient to support a conclusion that the unadjusted counts are more accurate under any different approach to distributive accuracy. At the very least, then, the remand ordered by the court of appeals would be appropriate to permit the Secretary to redetermine the comparative accuracy of the two counts under a constitutionally permissible definition of distributive accuracy.

In the second place, the United States has offered neither authority nor justification for the radical conclusion that at a certain level of technical complexity issues of constitutional magnitude may be determined by agencies and then shielded from all but deferential judicial review. None of the five cases cited by the United States for the proposition that courts must defer to technical determinations by federal agencies, U.S. Br. at 34, involved constitutional claims. All arose under federal statutes—the APA and the National Environmental Policy Act of 1969—that authorize only limited judicial review of agency decisions.[24] Where a claim arises under the Constitution,

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[24] Four of the cited decisions explicitly identify the APA, 5 U.S.C. § 706(2)(A), as both the source of and the limitation on the court's power to review the agency's action. *Thomas Jefferson University v. Shalala*, ___ U.S. ___, 114 S.Ct. 2381, 2386-2387 (1994) (interpretation by Secretary of Health and Human Services of agency regulations governing Medicare reimbursements to teaching hospitals); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 & n.21 (1989) (determination by Army Corps of Engineers not to file supplemental environmental impact statement); *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 90 & n.3 (1983) (Nuclear Regulatory Commission decision concerning presumed environmental impact of storage of certain nuclear wastes and application of that presumption to nuclear power plant licensing); *International Fabricare Institute v. Environmental Protection Agency*, 972 F.2d 384, 389 (D.C. Cir. 1992) (regulation of drinking water

however, neither the text of Article III nor the structure of the overall scheme of government suggests that judicial authority diminishes as the complexity of subject matter increases. Certainly the United States cites no case that intimates, much less holds, that fundamental constitutional rights are attenuated when the processes requisite for their vindication involve a degree of scientific or technical sophistication. Indeed, this Court has as readily invoked the aid of statistical analysis in addressing constitutional claims, *e.g.*, *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 697-698, 700-703 (1989); *Castaneda v. Partida*, 430 U.S. 482, 496 nn.16-18 (1977), as it has undertaken to gloss the mathematics of apportionment, *Montana*, 503 U.S. at 455-456, 461-463.

The most profound flaw in the United States' argument, however, has nothing to do with institutional relations *between* the Judiciary and the Executive and everything to do with institutional relations *within* the Executive. Resting its argument on cases reflecting judicial deference toward, for example, the expertise of the Nuclear Regulatory Commission concerning nuclear waste and the expertise of the Environmental Protection Agency concerning drinking water contaminants, the United States suggests that comparable deference is due the "technical expertise" of the Commerce Department officials who decided against adjustment. U.S. Br. 33-34. But "technical expertise" with respect to the census rests within the Bureau. The Bureau exercised that expertise in designing, implementing, reviewing and recommending use of the PES-based adjustment. The Secretary's decision, without contributions from nor review by the expert Bureau, was made in derogation of that technical expertise. Judicial

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contaminants). The fifth case, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), arose under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C), which similarly limits judicial review of agency action. 427 U.S. at 410 n.21.

review of the Secretary's decision should not be impeded by a respect for expertise that the Secretary himself overrode.

As the agency responsible for the very data underlying the allocation of political power, the Bureau has a unique place in the Executive branch. If the source of those data is tainted, the legitimacy of the allocation of power and thus of the uses of that power are called into question.

> "There is a need to protect the Bureau of the Census against politicization. The potential for polluting a highly technical, objective statistical procedure with political bias is real and the implications for congressional reapportionment and a host of Federal assistance programs could be dramatic."

The Census Reform Act: Hearings on H.R. 8871 Before the Subcommittee on Census and Population of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. 4-5 (1977) (statement of Rep. Leach). A. Ross Eckler, who served as Director of the Bureau from 1965 to 1969, has noted that, "as a rule [the Bureau] has been given a good deal of independence in carrying out its tasks." A. Ross Eckler, *The Bureau of the Census* 129-130 (1972).

The rule changed in 1987. A scholarly account of the adjustment controversy puts it this way:

> "What was radically different about the 1990-1991 adjustment decision was that the Department of Commerce took it away from the bureau and held onto it tightly. Starting in 1987 when the undersecretary announced unilaterally that there would be no adjustment in 1990, the department retained control over the decision; the department "undelegated" it from the bureau. . . . [F]or decades census officials had been making decisions with equally weighty numerical implications. Census bureau officials had made those decisions responsibly."

Harvey M. Choldin, *Looking for the Last Percent: The Controversy over Census Undercounts* 237 (1994). Former Bureau Director Bryant, citing and agreeing with Dr. Choldin, describes the events of the period as the "[D]epartment's 'takeover' of the Census Bureau." Barbara E. Bryant, *Moving Power and Money: The Politics of Census Taking* 158 (1995).

Against that backdrop, rote invocation of the doctrine of deference to agency expertise rings hollow. The principle that resolution of "issues requir[ing] a high level of technical expertise . . . is properly left to the informed discretion of the responsible federal agencies", *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976), bears less meaningfully on judicial review of the Secretary's decision than does the principle that "expertise cannot be used as a cloak for fiat judgements." *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 926 F.2d 1206, 1211 (D.C. Cir. 1991).

The United States also argues that, absent a uniform rule of deference, cases concerning census accuracy might produce conflicting findings of fact among district courts and force appellate courts to act as fact-finders. *Id.* 34-35. The argument proves far too much. The United States itself concedes that "[t]he courts would be open to consider" a claim of "[i]ntentional undercounting of racial minorities in the conduct of the census". *Id.* 45-46. Yet such a claim, which the United States recognizes would be analyzed without a framework of deference, *id.* 46, could easily arise before different district courts, which could arrive at different resolutions based upon different findings of fact. A variety of devices—including certification of a nationwide class, Fed. R. Civ. P. 23; certification to the Judicial Panel on Multi-District Litigation, 28 U.S.C. § 1407; orders of transfer among district courts, 28 U.S.C. § 1404; and deference among courts of coordinate jurisdiction—are available to resolve such conflicts. An extraordinary new rule of deference to such agency

determinations as may be simultaneously susceptible to challenge in different districts is unwarranted.

4. As further support for its contention that the Secretary's ultimate determination concerning the accuracy of the adjusted and unadjusted data should not be overturned, the United States argues that "the formulation and evaluation of the proposed adjustment involved a series of complex processes and assumptions in a highly technical area" and that "[i]n the Secretary's view . . . the analysis tended to show that the adjusted figures were less accurate than the unadjusted count at every level from the state level down." U.S. Br. 36. It is true that the *Bureau's* work on the adjustment involved technical decisions. But it is not true that the Secretary's decision turned on technical issues. His decision turned on particular uses of the concept of distributive accuracy, uses readily susceptible to non-expert review.[25] The Secretary's "view . . . that the adjusted figures were less accurate" reflected no more than the conclusion of his flawed approach to analyzing accuracy combined with the iron presumption of guideline one.

The United States further argues that "[t]here were . . . substantial uncertainties in the record that weighed against a determination that the particular adjustment under consideration was distinctly meritorious and superior to the adjusted figures", *id.* 36, a statement developed by showing that, at several points, decisions made in planning the adjustment process could have been made otherwise and that,

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[25] It could scarcely be otherwise. Robert A. Mosbacher, the Secretary of Commerce who made and announced the decision against adjustment in July 1991, was "not a statistician," as he forthrightly put it in announcing his decision. Pet. App. 139. That the Secretary of Commerce removed the decision on adjustment from the expert agency, the Census Bureau, does not mean that the non-expert Secretary, having rejected the expert recommendation of the Bureau's director, can continue to characterize the decision as "highly technical."

if made otherwise, would have yielded different results (conceivably affecting the apportionment of the House of Representatives). The argument is premised on a *non sequitur*. Even supposing the United States to have shown that "the particular adjustment under consideration was [not] distinctly meritorious," *i.e.*, that other adjustments were possible and might even be better, it does not follow that the adjusted data in question are worse than the unadjusted data. On the question of whether an elephant is or is not bigger than a horse, one would suppose that evidence that a whale is bigger than either is not probative.

But it is a noteworthy fact about the evidence the United States cites—from Dr. Wachter's test of "five alternative adjustment calculations" through the Bureau's 1992 revised corrected figures (based on a different post-stratification and no smoothing)—that *every* approach to adjustment finds the uncorrected enumeration to have erroneously shifted a seat in the House from Wisconsin to California.[26] DX 39 at 24-25 and Table 2.1. Neither the Secretary in his decision nor the United States before this Court, denies that Wisconsin enjoys an additional seat in Congress, and California is deprived of one, solely because of deficiencies in the uncorrected enumeration.[27]

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[26] The Bureau's loss function analysis shows that the unadjusted counts malapportion two seats more in the House of Representatives than do the adjusted. Tr. 1267. The United States itself acknowledges that the revised corrected figures developed by the Bureau in 1992 show a shift of the same seat from Wisconsin to California. U.S. Br. 18. *See also* Pet. App. 220 (use of different smoothing model showed shift of seat from Wisconsin to California).

[27] The United States suggests that none of the plaintiffs have standing to assert constitutional claims based on the malapportionment of Representatives among the States, because California chose not to appeal from the district court's decision. U.S. Br. 19 n.16. But Arizona, another State that gains a Representative if the adjusted figures are used, is a

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE SECRETARY'S DECISION WAS SUBJECT TO STRICT SCRUTINY, THAT PLAINTIFFS HAD SHOWN THAT THE DECISION DID NOT REFLECT A GOOD FAITH EFFORT TO MAXIMIZE CENSUS ACCURACY AND THAT THE CASE SHOULD BE REMANDED TO PERMIT THE UNITED STATES AN OPPORTUNITY TO SHOW A COMPELLING NECESSITY TO USE LESS ACCURATE DATA FOR THE ATTAINMENT OF SOME LEGITIMATE OBJECTIVE

1. The United States argues that the court of appeals erred in applying cases such as *Karcher* to "the Executive Branch's

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respondent. Moreover, individual voters who are residents of California have standing based on the malapportionment of the House, in which Representatives "'represent the people as individuals'", *Montana*, 503 U.S. at 459-460 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 14 (1964)). The United States questions whether the State is not the proper party to assert a challenge to the apportionments. U.S. Br. 19 n.16. The suggestion is that a State could limit equal representation rights for its residents by giving up a Representative to which its residents were entitled and leaving them with larger congressional districts (and more diluted votes) than their constitutional entitlement would provide. The authority just cited rebuts that suggestion. The United States' further suggestion that it makes a difference that the State commenced but then discontinued its participation would have the odd consequence of putting residents in a *worse* position if their State joined their suit than if the State never participated at all. Finally, once it is established that one party has standing to challenge the apportionment, further analysis is unnecessary, since any adjustment must be nationwide. *See id.* at 35. The United States also concedes, *id.* at 30 n.23, that other plaintiffs have standing to challenge the Secretary's decision due to injuries based upon the distribution of federal funds. That not all of the plaintiffs before this Court can assert every claim before the Court is of no practical significance, since the decennial census must comprise just one set of figures whether used for apportionment, redistricting or allocation of funds.

conduct of the census and certification of state population figures" because of constitutional constraints on the apportionment that prevent equalization of congressional district sizes among states. U.S. Br. 40 & n.30.[28] The court of appeals, however, explicitly recognized that, because of those constitutional constraints—that each State be allotted at least one Representative, that no district be smaller than 30,000 people, and that congressional districts not cross State boundaries—precise equality of voting power cannot be achieved for the nation as a whole. Pet. App. 35. But, the court, relying on *Montana*, wrote, "[t]hat the goal of precise equality cannot be achieved nationwide on account of those constraints . . . does not relieve the federal government of the obligation to make a good-faith effort to achieve voting power equality 'as nearly as is practicable.'" *Ibid.* (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964)).

The court of appeals' reliance on *Montana* was correct. There, having determined that the case was justiciable, the Court proceeded to analyze Montana's claim in light of *Wesberry*. The Court's rejection of Montana's challenge was based not on the conclusion that the goal of equal representation is irrelevant to the apportionment of the House but on the determination that the facts in *Montana* did not

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[28] The United States also suggests that *Karcher* does not apply because of the "technical complexity of the enumeration process", U.S. Br. 40 n.30; but that "technical complexity" refers to the work of the Bureau, not the decision of the Secretary, *supra*, p. 61. The United States also argues that the constitutional grant of authority to Congress to dictate the manner of the census "suggests that a broader range of legitimate governmental objectives may be available to justify use of census figures that do not maximize population equality than would be true of decisions made in the state districting context." *Ibid.* As the United States recognizes, *ibid.*, *Karcher* already qualifies the obligation to maximize equal representation in terms of practicability, 462 U.S. at 730, so the United States' objection cannot be that the *Karcher* standard fails to take practicability into consideration.

"establish a violation of the *Wesberry* standard." *Montana*, 503 U.S. at 461. In particular, the Court observed that the constitutional constraints on apportionment "make[] it virtually impossible to have the same size district in any pair of States, let alone all 50." *Id.* at 463.[29] Yet the Court embarked on a detailed analysis of the arguments, based on

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[29] Montana challenged the use in apportioning the House of the method of equal proportions (Hill method), arguing that equal representation was better served by the method of the harmonic mean (Dean method); had the Dean method been used, a seat in the House would have shifted from Washington to Montana. *Montana*, 503 U.S. at 460-461. With reapportionment after the 1990 census, the average congressional district size nationally ("ideal district size") was 572,466 persons. The actual apportionment, using the Hill method, gave Montana a single district, with a population of 803,655, and gave Washington an average district of 543,105. The absolute deviation from ideal district size for Montana was thus 231,189 and for Washington 29,361. Use of the Dean method would have minimized absolute deviations from ideal district size; that is, the sum of the differences between the average and the ideal district size in the two States would have been reduced. *Id.* at 461. But *relative deviations* from ideal district size (the ratio of the absolute difference from the ideal to the average district size within the state) would have been increased for both states; the Hill method minimized *those* deviations. *Id.* at 462 & n.40. It was with respect to the choice between a method that would minimize absolute deviations and a method that would minimize relative deviations that the *Montana* court wrote: "The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course." *Id.* at 463. The United States now suggests that that sentence was meant generally to counsel judicial abstinence when faced with claims concerning Section 2, Clause 3 of Article I of the Constitution. U.S. Br. 26-27; *see also* Wisc. Br. 21. But if the Court had had such a broad proposition in mind, it would never have embarked on the detailed discussion of the competing arguments, based on equal representation, in favor of either method; rather, the Court would have ended the discussion at the point of establishing that, with the apportionment of the House at issue, the goal of "'precise mathematical equality'" in representation is "illusory for the Nation as a whole." *Id.* at 463 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969)).

equal representation, favoring the method of apportionment used and that Montana proposed. *Id.* at 459-463. The Court also satisfied itself that Congress' choice of a method had been made in an apparently good-faith attempt to implement the Constitution's purpose. *Id.* at 464. The Court reaffirmed that approach in *Franklin*, when, citing *Montana*, it reviewed the Secretary's decision concerning allocation to the states of overseas personnel to determine whether it was "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S.Ct. at 2777.

On the basis of this Court's decision in *Montana*, the court of appeals "conclude[d] that the federal government, no less than the states, is required to make a good-faith effort to achieve the Constitution's plain objective of equal representation for equal numbers of people." Pet. App. 35. The Secretary's failure to select as the decennial census the counts that would in fact promote that goal would therefore subject his decision to strict scrutiny, both because the decision impaired a fundamental right and because it impaired that right more severely for members of minority groups, a "suspect" class.

2. The United States next argues that, assuming application of *Karcher*, the court of appeals nonetheless erred in determining that an absence of good faith had been shown.

As evidence of good faith, the United States points first to "the success of the Bureau in counting 98.4% of the nation's population," U.S. Br. 41. The United States misapprehends the thrust of respondents' claim and of the court of appeals' decision. Respondents have never challenged the acumen nor the *bona fides* of the Bureau: there is no doubt that the *Bureau* made a good-faith effort to achieve the most accurate count practicable, and no small part of that effort was reflected in the recommendation of the Bureau's Director that the census counts be adjusted. Respondents' challenge, however, is to the *Secretary's* decision. The

question of whether the Secretary rendered his decision in favor of one set of data in good faith is not answered by examination of the circumstances under which the two sets of data came into existence. There is no inconsistency in asserting that each of two sets of data was created (by the same agency, after all) in a good-faith effort to achieve population equality but that the decision between them was not made in pursuit of the same good-faith effort.

Second, the United States argues that, since "[t]he Constitution allows for varying approaches to the conduct of the census and varying measures of accuracy and equity", U.S. Br. 43, the Secretary's choice of one measure of accuracy does not demonstrate an absence of good faith merely because another measure might have been chosen. Respondents do not advocate a particular approach to the conduct of the census, nor do they deny that there is considerable choice afforded the Secretary among measures of accuracy and equity. But the Secretary's choice of a measure of accuracy that is concededly "not a good way" of measuring accuracy and in the face of evidence that application of the measure actually disserves the goal of equal representation is not an "apparently good-faith choice of a method", U.S. Br. 43 (quoting *Montana*, 503 U.S. at 464) for determining the set of data to be reported as the decennial census.[30]

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[30] The United States also argues that the court of appeals' decision opens the door to a host of challenges to decisions made in planning and conducting the census. U.S. Br. 41 & n.31. As the list of cases cited by the United States, *id.* 41 n.31, shows, when such cases have been brought in the past, the United States has invariably prevailed. Regardless of the court of appeals' decision in this case, it is unlikely that litigants challenging census-taking decisions in the future will enjoy any greater success. With or without the court of appeals' decision, a litigant must show that a proposed change in the planning and conduct of the census will in fact increase accuracy across the nation. (As the United States correctly points out, U.S. Br. 35, even a regional change in census

The United States complains, U.S. Br. 44-45, that the court of appeals expressed, but failed to justify, a preference for numeric accuracy over distributive accuracy. The court of appeals expressed no such preference. Rather, the court of appeals correctly described the Secretary's decision as (1) rejecting use of adjusted data that would indisputably ameliorate the differential undercount, and (2) basing that rejection on the Secretary's assertion that, under the approach to "distributive accuracy" he adopted, he was not convinced the adjusted counts would achieve superior distributive accuracy. Differential undercounting has *distributive* consequences, adversely affecting allocation of representation and funding for places with disproportionately minority populations; that is why the Bureau worried about the problem of differential undercounting and devoted so much energy to solving it. It is surely fair to say, as the court of appeals did, that, when the Bureau presented the Secretary with counts that ameliorated the differential undercount, he "decline[d] to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities" if there were any distributive consequence with respect to which an adjusted census "would be different from . . . , although just as accurate" as the unadjusted. Pet. App. 38. The Secretary, acknowledging that the adjusted data had ameliorated the differential undercount but refusing to

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procedures cannot be analyzed without taking into consideration its impact nationally.) Because census-taking involves the complex balancing of error, a mere demonstration that a particular technique will enhance accuracy with respect to one aspect of the count is not a demonstration that overall accuracy will be improved. Only a systematic demonstration of a technique to improve overall accuracy would underpin a successful claim under the court of appeals' analysis. And only the Bureau itself is ever likely to be in a position to make such a demonstration. The unique circumstances present here are most unlikely to recur: the United States' invitation to protect it from the inconvenience of lawsuits at the expense of diminished equality in representation should be declined.

recognize the distributive impact of that undercount, subsumed all evidence of improved accuracy for "racial and ethnic populations" under the concept of numeric accuracy, *see* Pet. App. 146-147, 158, 160, 165, 182-185, 200-201, and dismissed that evidence as "not relevant to the determination of distributive accuracy." Pet. App. 201.

With respect to the United States' final argument on good faith, U.S. Br. 44, the district court's findings are not "enigmatic," *supra*, pages 46-47. The district court found that the adjusted counts had been shown to be more accurate for most purposes for which the census is used but declined to characterize the Secretary's contrary conclusion as "arbitrary or capricious." That court examined the Secretary's decision only to determine whether it could be supported under the broad discretion afforded by the Secretary's own guidelines. From the premises that the Secretary selected the less accurate data as the census but that his guidelines permitted him to do so it hardly follows that the Secretary's decision was necessarily the product of a good-faith effort to maximize census accuracy.

The United States scarcely reckons with the additional bases for the court of appeals' determination that the Secretary's decision did not reflect "the required good-faith effort", Pet. App. 39. The court of appeals observed that the Secretary had sought to justify his decision against adjustment in part with the ostensible concern that using an adjustment admittedly not the result of political manipulation might nonetheless open the door to such manipulation in future censuses and in part with the opinion (not shared by the Bureau) that the use of statistical processes would discourage State cooperation with future census efforts. Pet. App. 38. The United States admits the Secretary's reliance on those factors, then describes them as "not central to this case for present purposes" and finally explains that the Secretary's concerns were "not irrelevant to the overall, long-term accuracy of the

census." U.S. Br. 29 n.21. The speculative character of the Secretary's ostensible concerns and their attenuated relationship ("not irrelevant") to any interest in census accuracy, taken together with the Secretary's readiness to invoke any available argument against adjustment, help establish that the decision against adjustment was not made in the interest of maximizing census accuracy but on the basis of an unshakable predisposition. As the court of appeals observed, the Secretary was aware of but indifferent to the long, well-documented history of differential undercount and Bureau attempts to reduce it. Pet. App. 39. The Secretary's effectively irrebuttable presumption against adjustment, his appointments to the Special Advisory Panel, his rejection of Bureau expertise, his retention of outside experts for the specific purpose of designing a defense of his decision, all testify, as does the decision itself, to the absence of a good-faith effort to achieve the most accurate census counts practicable.

3. The United States asserts that "[t]he court of appeals was simply wrong" in determining that the Secretary's decision was subject to heightened scrutiny without proof of discriminatory purpose. U.S. Br. 45. The United States, relying on *Washington v. Davis*, 426 U.S. 229, 239-245 (1976), asserts that "establishment of an equal protection violation based upon racial discrimination requires proof of a discriminatory *purpose*." U.S. Br. 45 (emphasis in original). But the court of appeals, in an analysis not discussed by the United States, explained that, "[a]lthough for most types of equal protection claims, a plaintiff must show the government's discrimination was intentional, the Supreme Court has not imposed such a requirement in any of the cases involving apportionment." Pet. App. 35-36 (citations omitted). The court of appeals quoted the opinion in *Tucker v. United States Department of Commerce*, 958 F.2d 1411, 1414 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 407 (1992), which points out that malapportionment cases do not require proof

of intent, though other equal protection cases do. "The purpose of *that* requirement [of proof of intent] is to prevent the concept of equal protection from being used to invalidate governmental policies that just happen to bear more heavily against a vulnerable group, whereas the reapportionment cases vindicate a right that the Supreme Court has found to be implicit in the Constitution to an apportionment mechanism that will, so far as possible give each person's vote the same weight in an election." Pet. App. 36. The effect of the Secretary's decision is that, in general, the votes of minority citizens are given less weight than those of non-minority citizens. What determines the burden of proof is the fact that this is a case concerning electoral representation, not the fact that the disparate effect occurs along racial lines.

The court of appeals explained, "In general, if a law alleged to infringe a certain right directly would require a heightened degree of scrutiny, heightened scrutiny should also be given when the law is alleged to infringe that right discriminatorily." Pet. App. 33 (citations omitted). The Secretary's choice of a count generally less accurate would thus trigger strict scrutiny because of the adverse impact on equal representation rights. Even were it assumed that the Secretary was genuinely in doubt about the comparative accuracy of the two counts or found the two counts equally erroneous, his choice of the count in which inaccuracy is systematically concentrated among minorities instead of the count in which inaccuracy is non-systematically distributed throughout the population would warrant strict scrutiny. *Cf. Karcher*, 462 U.S. at 752-755 (Stevens, J., concurring) (districting plan that achieves equipopulousness may nonetheless violate right of equal representation through adverse impact on minorities together with departures from neutral criteria). The degree of scrutiny, and the burden of proof, flows from the nature of the right (equal representation), not the basis on which the infringement occurs. The United States' argument that there is no proof of

discriminatory animus, U.S. Br. 45-50, is therefore beside the point.

The United States also argues that there is no proof that members of minority groups are differentially distributed and that the consequence of differential undercounting of minorities would therefore be to deprive areas in which minorities are concentrated of political representation and funding. U.S. Br. 48. But "[i]t is absurd to suggest that a disproportionate loss of political representation will not follow in the wake of a miscount." Pet. App. 128-129. That was the very reason the Bureau undertook its laborious, decade-long effort to ameliorate the differential undercount—precisely because of the impact of that undercount on the areas in which minorities are concentrated. *See* Jt. App. 79; Tr. 1277. In any event, plaintiffs demonstrated at trial both that undercount was, as expected, more severe in those states with greater concentrations of minority residents and that the effect of differential undercounting was to deprive residents of equal representation. *Supra*, pages 26-28.

III. ADJUSTMENT OF THE CENSUS IS NOT PROHIBITED BY 13 U.S.C. § 195

1. The States of Wisconsin and Oklahoma argue at length that any adjustment of the census is barred by 13 U.S.C. § 195, which provides:

> "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

See Wisc. Br. 31-33, Okla. Br. 7-18. As pointed out by the United States in its Opposition to State Petitioners' Motion to Extend Time for Oral Argument and for Divided Argument, that argument was not presented in either States' Petition for Writ of Certiorari and is not encompassed by any

question with respect to which the Court has granted certiorari. *See* Federal Petitioners' Opposition to State Petitioners' Motion to Extend Time for Oral Argument and for Divided Argument ("U.S. Opp."). The question, therefore, is not properly before the Court. The State petitioners should not be allowed argument on, and the respondents should not be required to address, this issue. The State petitioners' tactics amount to "the practice of smuggling additional questions into a case after [the Court] grant[ed] certiorari." *Irvine v. California*, 347 U.S. 128, 129 (1954).

Supreme Court Rule 14.1(a) clearly admonishes that "[o]nly questions set forth in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). It is not enough that a question be "related" to or "complementary" to the question presented. Stern, Gressman, et al., *Supreme Court Practice* § 6.25(f) at 338 (7th ed. 1993). In order to be considered "fairly included," the question must be "predicate to an intelligent resolution of the question on which [the Court] has granted certiorari." *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).

The question of whether section 195 prohibits the use of statistical sampling in determining the census figures for apportioning Representatives is separate and distinct from the question of whether the decision of the Secretary not to correct for the differential undercount of minorities was consistent with the language of the Constitution. *See* State of Wisconsin, Petition for Writ of Certiorari, at i (Question Presented); State of Oklahoma, Petition for Writ of Certiorari, at i (Questions Presented). In fact, as noted by the United States, addition of this question will only serve to multiply the issues before the Court, as the Court will "be required to determine whether such a prohibition [is] itself consistent with the Constitution." U.S. Opp. at 4.

2. In any event, the argument presented by Wisconsin and Oklahoma is incorrect and should be rejected.

As the court of appeals explained, Pet. App. 23-26, section 195 must be read in conjunction with 13 U.S.C. § 141, which provides in pertinent part:

> "The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date', in such form and content as he may determine, *including the use of sampling procedures and special surveys*. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary."

13 U.S.C. § 141(a) (emphasis added). Section 141(a), as opposed to section 195, is the basis for the Secretary's authority to conduct the decennial census. As such, Congress has specifically authorized "the use of sampling procedures and special surveys" to be used for the "census of population." *Ibid.*

Interpreting this language, the court of appeals not only concluded that Congress authorized the use of statistical imputation in determining the census figures but *encouraged* it. Pet. App. at 107-110. As Wisconsin and Oklahoma admit, the same conclusion has been reached by several courts before. *See Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on other grounds*, 642 F.2d 617 (6th Cir. 1981). The United States too "agree[s] with the court of appeals that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." U.S. Br. 26.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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December 8, 1995

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Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

STATE OF OKLAHOMA,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

UNITED STATES DEPT. OF COMMERCE, *et al.*,
Petitioners,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER STATE OF OKLAHOMA'S REPLY BRIEF ON THE MERITS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF WISCONSIN, Petitioner,
v.
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STATE OF OKLAHOMA, Petitioner,
v.
CITY OF NEW YORK, et al., Respondents.

UNITED STATES
DEPT. OF COMMERCE, et al., Petitioners,
v.
CITY OF NEW YORK, et al., Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER STATE OF OKLAHOMA'S REPLY BRIEF ON THE MERITS

Oklahoma's opening brief argued that the Secretary of Commerce's decision not to statistically adjust the 1990 decennial census was the only legally permissible course of

action available. Oklahoma advanced this argument under art. I, § 2, cl. 3 of the Constitution which mandates that the "actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct." Under Oklahoma's view, Congress exercised the power granted to it by the Constitution and enacted the Census Act, which directs the manner in which a census is taken. Congress allows statistical sampling for some census purposes but has specifically prohibited a statistical adjustment of the decennial census for apportionment purposes under 13 U.S.C. § 195. The same straightforward argument was similarly advanced by Wisconsin in its opening brief.[1]

Oklahoma further argued that Congress' decision not to permit statistical sampling to determine the census count for apportionment purposes commands considerable deference from the judiciary and furthers important national goals of political stability and public confidence. Oklahoma addressed the lack of justiciable standards for reviewing census methodology. Oklahoma also contended that the Second Circuit Court of Appeals' decision is inconsistent with decisions of the Sixth and Seventh Circuits which hold the apportionment clause does not create a constitutional right to census accuracy.

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[1]The federal petitioners, however, agreed with the Court of Appeals "that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." [U.S. Br. 26.] The federal petitioners made no reference to § 195 in their brief. The Executive Branch and the States have different views as to whether adjustment was a permissible choice under the law. Both Oklahoma and Wisconsin have contended throughout that the Secretary's decision not to adjust was constitutionally permissible and statutorily required.

The *City of New York, et al.* respondents ["respondents"] choose to rebut few of these contentions, except indirectly, or in a fashion that avoids the merits of the particular argument.

1. With respect to Oklahoma's central argument that the Secretary's decision was consistent with the manner that Congress had by law directed, the respondents first contend that the prohibition of 13 U.S.C. § 195 is not an issue properly before the Court (thereby aligning themselves with the argument used earlier by the federal petitioners in seeking to defeat oral argument by the States[2]). According to the respondents,

> [t]he question of whether section 195 prohibits the use of statistical sampling in determining the census figures for apportioning Representatives is separate and distinct from the question of whether the decision of the Secretary not to correct for the differential undercount of minorities was consistent with the language of the Constitution.

[Respondents' Br. 73.] Whatever distinction the respondents are seeking to draw from this observation, it has no bearing here. Instead, it is clear that the issue, as framed and argued by both Oklahoma and Wisconsin, is before the Court.

The "Questions Presented" by Oklahoma include:

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[2]The Court granted the motion to divide argument to the extent of allowing one State, Wisconsin, to divide argument with the Solicitor General.

> Whether the decision of the Secretary of Commerce is consistent with the mandate of Article I, § 2, cl. 3 of the United States Constitution that "[t]he actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct."

[Oklahoma's Petition for Writ of Certiorari, at i.]

Wisconsin presented the question of whether the Secretary's decision is "consistent with the language of the Constitution and the constitutional goal of equal representation." [Wisconsin's Petition for Writ of Certiorari, at i.][3]

As framed, the questions presented by both States fairly include the § 195 issue. [Sup.Ct.R. 14.1(a).] Certainly, at the very least, whether the plain language of § 195 prohibits statistical adjustment and whether that congressional directive is constitutional are issues "essential to analysis" of the decision below, which fall within the "fairly comprised" rule. *Procunier v. Navarette*, 434 U.S. 555, 559-60 n. 6 (1978); R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (7th ed. 1993), § 6.25(f), at 339.

Supreme Court Rule 14.1(a) serves both to provide the respondents with notice and assist the Court in selecting

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[3]Ironically, the broadest, most generic Question Presented is by the federal petitioners, who voiced the attack now used by the respondents. The federal petitioners' Question Presented reads: "Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment to the 1990 census violated the Constitution." [Federal Petitioners' Petition for Writ of Certiorari, at i.]

cases. *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992). Respondents cannot contend lack of notice. The identical argument was addressed vigorously by the States in briefing below. In their joint brief to the Court of Appeals, Oklahoma and Wisconsin argued:

> Article I, § 2, cl. 3 of the United States Constitution provides that the decennial census shall be conducted in such manner as Congress by law directs. Even if Congress could constitutionally direct the census to be statistically estimated, at this time it has not done so.

Oklahoma and Wisconsin expressly relied upon the prohibition of 13 U.S.C. § 195. [Supp. Br. of Wis. and Okla. at 1-9, see Dkt. Entry 11/8/93, Jt. App. 30.] The plaintiff-appellants below [respondents here] replied to this argument and claimed that Wisconsin and Oklahoma were "wrong" in their interpretation of 13 U.S.C. § 195. [Reply Br. of Plt.-Applts. at 24, fn. 9, see Dkt. Entry 12/6/93, Jt. App. 31.] The Court of Appeals decided against Oklahoma and Wisconsin by interpreting § 195 in a fashion which allowed and even "encouraged" the use of statistical sampling in determining census figures. [Pet. App. 25.][4]

Oklahoma's and Wisconsin's petitions for writ of certiorari, in compliance with Supreme Court Rule 14.1(f), set forth 13 U.S.C. § 195 as one of the three constitutional and statutory provisions involved. [Oklahoma's Petition for Writ of Certiorari, at 4-5; Wisconsin's Petition for Writ of

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[4]Consistent with the respondents, references given as "Pet. App." are to Wisconsin's appendix to the petition for a writ of certiorari filed in No. 94-1614.

Certiorari, at 1.][5] Respondents do not attempt to, and cannot, explain how § 195 can be designated as "involved in the case" and not be an issue which is encompassed by the petitions and properly before the Court.

Against these facts of record, the respondents and federal petitioners are simply incorrect when they assert that Oklahoma's Question Presented (under art. I, § 2, cl. 3) fails to encompass the proper interpretation of Congress' directive in 13 U.S.C. § 195. Respondents are equally wrong when they make this same assertion against Wisconsin.

2. To bolster their contention that argument should not be allowed on this issue, respondents also claim this question will only serve to multiply the issues before the Court, because (quoting the federal petitioners), the Court will "be required to determine whether such a prohibition [is] itself consistent with the Constitution." [Respondents' Br. 73.] Oklahoma contends this paramount issue simplifies rather than multiplies the issues. Unless § 195 means something different from its plain language or unless it is not consonant with the constitutional text, the inquiry should end with § 195. The inquiry should end because the manner of conducting the census is delegated to Congress and Congress responded with § 195.

The reality is that, absent the intervention of Oklahoma and Wisconsin in the lower court actions, this potentially dispositive issue would have been left unaddressed because the remaining parties before this Court share the common goal of simply ignoring 13 U.S.C. § 195. The Executive Branch has a strong interest in gaining for a

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[5]The federal petitioners included no reference to 13 U.S.C. § 195.

federal agency the broadest decision-making power possible and thus for altogether different reasons than the respondents "agrees with the court of appeals that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." [U.S. Br. 26.]

The debate between the Executive Branch federal petitioners and the respondents presumes the Secretary possesses the statutory power to adjust and focuses primarily on whether the Secretary's administrative decision not to do so is constitutionally flawed. Oklahoma contends the Secretary is statutorily prohibited from any course other than the one taken. If fundamental change is going to occur in the manner of determining the census count, then the change must occur through Congress and not through any other branch of government. Respondents and the federal petitioners cannot selectively ignore constitutional and statutory text that impacts reasoned analysis. In *any* review of an agency's action, it is proper to ask whether the agency has authority to do what it did or what it is being asked to do. It is impossible for this Court to rule that the Secretary should have adjusted the 1990 census for apportionment purposes *without* determining whether he has the power to adjust. Yet, that is precisely what respondents ask this Court to do.

3. The respondents choose not to address the portion of the Constitution which directly speaks to the business of census taking. Article I, § 2, cl. 3 states that the decennial census shall be conducted "in such Manner as [Congress] shall by Law direct." Respondents make no reference to this provision or to its application. If the Constitution directs that Congress determine census methodology and § 195 is a response to that constitutional directive, then it would appear

that § 195 should be addressed in a case that concerns census adjustment.

In their seventy-five page brief, respondents devote a single page to countering the merits of the States' interpretation of § 195. Respondents' argument is limited to a recitation of 13 U.S.C. § 141(a), and the conclusion that the Secretary can choose to rely on § 141(a), instead of § 195, as the basis for his authority. The respondents close by stating that the Court of Appeals correctly held that these two provisions indicate that Congress encourages adjustment and other courts and the federal petitioners concur. There is no further discussion of the § 195 issue.

Respondents' argument is wrong. While Oklahoma concedes that a handful of lower courts have judicially interpreted § 195 in a way that circumvents the plain language, none, save the Court of Appeals, have concluded that the two sections read together meant Congress intended to encourage use of statistical sampling for apportionment purposes. In this case, the Second Circuit reached this strained conclusion, but the other three cases did not do so. Moreover, Oklahoma submits that none of the three 1980 district court holdings relied upon by respondents can withstand careful analysis.[6] There is nothing in the Census

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[6]The cases are: *Carey v. Klutznick*, 508 F. Supp. 404 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd on other grounds*, 642 F.2d 617 (6th Cir. 1981). [See Respondents' Br. 74.] *Carey* held that adjustment was permissible under § 195, but only if done in conjunction with traditional counting methods. *City of Philadelphia* held that § 195 permits, but does not require, sampling for apportionment purposes. *Young* held that § 195

Act that allows the Secretary to choose to follow one part of the Act and ignore another part of it. The Census Act

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allows adjustment but prohibits the use of figures solely derived by statistical methods. None of the three cases holds that § 195 *encourages* adjustment for apportionment purposes.

Carey is wrong because it relies on *Young* and because it concludes that it must ignore the clear language of § 195. *Carey*, 508 F. Supp. at 415. *Carey* holds that it must adopt an interpretation that gives effect to both §§ 141(a) and 195. *Carey* does not, however, address the logical interpretation that these two statutes, when read together, direct that adjustment be used for non-apportionment census functions but not for apportionment purposes.

City of Philadelphia is decided incorrectly because it is based upon a selective reading of the legislative history of the Census Act. *City of Philadelphia* does not address the clear statements in the 1957 and 1976 House and Senate Reports that sampling procedures can be used by the Secretary except in the apportionment of the United States House of Representatives. See H. R. Rep. No. 1043, 85th Cong., 1st Sess., at 10 (1957); S. Rep. No. 698, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1706; S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5468.

Young is wrong for several reasons. First, the plain language of § 195 does not state that sampling can be a part of the count, but not all of the count, for apportionment purposes. Second, the conclusion that § 195 means what it says and actually prohibits adjustment for apportionment purposes does not render it unconstitutional. Article I, § 2, cl. 3 of the Constitution directs Congress to specify the decennial census method. Finally, *Young* errs because it is based upon the conclusion that there is a constitutional right to census accuracy.

contains both §§ 141(a) and 195, and both must be followed. Respondents also fail to address the fact that § 141(a) does not state that sampling or adjustment can be used for apportionment purposes. Section 141 merely provides that sampling can be used with the census and the census can be used to collect different types of information. When §§ 141 and 195 are read together, the logical conclusion is that adjustment is allowed for non-apportionment purposes. Respondents offer nothing to refute this conclusion. Respondents make absolutely no attempt to explain why the Secretary should be allowed to adjust when § 195 expressly states that there can be no adjustment for apportionment purposes. Respondents offer nothing to refute the plain language of § 195.[7] That plain language is the constitutionally prescribed "manner" which Congress by law directed under art. I, § 2, cl. 3.

Even if Congress could constitutionally direct the decennial census to be statistically estimated, at this time it has chosen otherwise. Thus, the Secretary would have violated the mandate of art. I, § 2, cl. 3 if he had decided to allow statistical sampling for apportionment purposes. Congress has, by law, directed otherwise.

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[7]As also noted in legal commentary, the conclusion that the prohibition in § 195 is not actually a prohibition "mutilate[s] the clear wording of the statute." Note, *Lies, Damn Lies and Statistics: Dispelling Some Myths Surrounding the United States Census*, 1 Detroit L. Rev. 71, 87 (1990); Note, *Death, Taxes and Census Litigation: Do the Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy?*, 64 Geo. Wash. L. Rev. (forthcoming Jan. 1996) ("the text of section 195 and its legislative history are clear -- sampling is not allowed [for] purposes of apportioning the House of Representatives.").

The language of § 195 is clear. If statutory language is clear, then judicial inquiry into statutory meaning is finished. *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980); *Negonsott v. Samuels*, 113 S. Ct. 1119, 1123 (1993). The law also presumes that when Congress speaks in a statute, it means what it says and it says what it means. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). Respondents ignore these presumptions. They offer no explanation as to why these canons of interpretation should not be followed. They do not and cannot explain away § 195.

Nor do respondents address the legislative history of § 195. Respondents do not dispute that the 1957 House Report, prepared with the enactment of § 195, states that "section 195 does not authorize the use of sampling procedures in connection with the apportionment of Representatives."[8] They also make no reference to the 1957 Senate Report which contains similar language.[9] Respondents do not deny that when Congress amended § 195 in 1976, it did not change the language that prohibits

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[8]U.S. Cong. House Comm. on Post Office and Civil Service. Revision of Census Law. Report to Accompany H.R. 7911. H.R. Rep. No. 1043, 85th Cong. 1st Sess., at 10, Washington, U.S. Govt. Print. Off., 1957, *and cited in* Cong. Res. Serv. Rep. for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, pp. 85-86, 96th Cong., 2d Sess. (Comm. Print 1980).

[9]S. Rep. No. 698, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1706, 1708.

adjustment for apportionment purposes. The obvious conclusion must be that if Congress made the prohibition at enactment and kept the prohibition at amendment, then the prohibition remains effective. Respondents do not challenge this argument.

4. Respondents also offer no response to Oklahoma's contention that Congress properly limited the census method in § 195 because Congress has the power to enact legislation that is "necessary and proper" to carry out its delegated responsibilities. U.S. Const. art. I., § 8, cl. 18. Congress has the power to determine the means of achieving its constitutionally authorized objectives. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *Kinsella v. United States*, 361 U.S. 234, 247 (1960). Congress decided that, as to the census objective, adjustment should not be used for apportionment purposes. This decision commands great deference from the judiciary, especially in light of the Constitution's explicit directive to Congress to determine the census-taking method. *United States Dept. of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992). Instead of granting deference to Congress' decision, respondents seek to completely ignore it by rejecting any application of § 195.

5. One primary reason advanced for granting the certiorari petitions was the conflict between circuit court rulings on the question of census adjustment. The Second Circuit's holding in this case is directly opposite to the decisions of the Sixth and Seventh Circuit Courts of Appeals in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), and *Tucker v. United States Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992). Both *City of Detroit* and *Tucker* rejected claims that the 1990 census should be statistically adjusted and both ruled that there is no

constitutional right to census accuracy. *City of Detroit*, 4 F.3d at 1375, 1378; *Tucker*, 958 F.2d at 1417, 1419. Respondents, however, make no attempt to refute these rulings. Respondents' treatment of these two cases is limited to one reference to *Tucker*. The lone reference to *Tucker* does not include the holding of the case but concerns only the issue of the requirement of intent in equal protection cases. [Respondents' Br. 70-71.] Respondents do not mention the *City of Detroit* opinion.

6. Respondents' brief demonstrates almost conclusively an observance made in both *City of Detroit* and *Tucker*. That is, adjudicating claims of this type would require the Court "to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to a census headcount." *City of Detroit*, 4 F.3d at 1378, quoting *Tucker*, 958 F.2d at 1418.

Respondents make no attempt to provide justiciable standards with which to decide this dispute and they do not address Oklahoma's contention that there are no available standards to apply. Neither the "one man, one vote" principle nor the constitutional language "in such Manner as [Congress] by Law shall direct" gives sufficient guidance to resolve a statisticians' debate. There is no justiciable standard by which to decide whether, in this case, the proposed formula with its 1,392 "smoothed," "modelled" and "regressed" adjustment factors is the formula required by the law.[10]

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[10]Respondents wholly misstate Oklahoma's position in this case by asserting that the "heart" of the petitioners' (and thus Oklahoma's) argument is based upon the claim that the "uncorrected census counts are, or at least probably are, as

Respondents admit that this dispute is framed by subjective, rather than legal, standards. Their analysis of the facts contains numerous references to the subjective nature of the issues involved: (1) the strata used in the Post-Enumeration Survey ("PES") provided "the greatest explanatory power in analyzing differences in undercount rates," (2) the Census Bureau director concluded that "prospects for a successful adjustment were good," (3) matching error in the PES "was not a serious source of bias," (4) the "impact of the aggregate error attributable to misreporting on the overall PES was insignificant," (5) "fabrications were found to be minimal," (6) error from follow-up interviews was of "minimal consequence," and (7) the Census Bureau concluded that "post-stratification had been effective." [Respondents' Br. 18, 22, 30, 31.] There are no legal standards to determine whether these conclusions satisfy the law. Nothing in the law directs a court to conclude whether something is a "serious," "insignificant" or "minimal" problem in a census adjustment formula. Respondents offer no legal standards to resolve this case.

7. While respondents pay lip service to the need to protect against politicization of the census process and imply politicization has occurred by the Secretary overriding technical expertise within the Census Bureau [Respondents'

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accurate as or more accurate than the corrected counts." [Respondents' Br. 2.] Oklahoma's position does not focus upon whether one method of number-finessing is better than another method. Instead, Oklahoma contends "responsibility for conducting the decennial census rests with Congress." *Baldridge v. Shapiro*, 455 U.S. 345, 347-48 (1982). Because broad discretion has been vested in Congress to direct the census process, the judiciary has only limited review.

Br. 58-59], respondents appear oblivious to the real dangers of political manipulation inherent in the course of action they advocate. If the Executive Branch has the power to make post-enumeration adjustments to the actual headcount, then any methodology for adjustments will be subject to partisan argument and "open the census process to charges of political manipulation." *Tucker*, 958 F.2d at 1413. Respondents pose no justification for disregarding concerns that opening the census up to adjustment by a variety of formulas will politicize the process and disrupt the transfer of political power in state governments. Respondents do not deny that public confidence in government and political stability are jeopardized in a world where the census figures are not or cannot be fixed because different interests advocate and litigate different adjustment formulas. The ability of federal courts to resolve complex statistical disputes about the best way to conduct a census is limited, at best. It is virtually guaranteed that not all courts would take the same side in a dispute of considerable technical complexity among census officials, statisticians and demographers. Protracted litigation disrupts and threatens the governmental timetable for a representative system of government. Here, return of the case to the district court would undoubtedly mean the census would be unresolved through the 1996 Presidential and congressional elections.

8. The majority of respondents' brief is devoted to the proposition that statistical adjustment results in a more accurate census and that the Secretary's refusal to adjust denies citizens equal voting power. [Respondents' Br. 48, 50.] As discussed above, this position is flawed because it does not address whether the Secretary has the *power* to adjust the census for apportionment purposes. If, however, one assumes for the sake of argument that the Secretary does have the ability to adjust, then respondents'

position still fails. Respondents' argument breaks down because it is premised upon a right to voter equality but it makes no connection between voters and the census. Respondents do not address the fact that the census does not count voters. It counts people, voters and nonvoters alike. This fact was addressed by the Seventh Circuit Court of Appeals in *Tucker*. After referencing this Court's adoption of the "one man, one vote" principle, the Seventh Circuit stated:

> Correcting the undercount might actually offend against that principle, by creating disparities in voting power based not on differences in the number of voters but on differences in the number of nonvoters.

Tucker, 958 F.2d at 1419.

The Seventh Circuit did not ultimately resolve this issue because it based its decision on other grounds:

> On the other hand, it can be argued that people, not just voters, are entitled to equal representation, [citations omitted] consistent with the Constitution's reference to apportioning congressional representation by "Numbers" (of people). [citations omitted] But all this is an aside. The dispositive consideration in this case is that, though even fine points of statistical methodology can have real consequences, a case about statistical

> methodology is a case whose gears fail to mesh with any judicially enforceable federal rights.

Tucker, 958 F.2d at 1419. Although the Seventh Circuit did not answer this question, the court in *Tucker* did recognize that this question is relevant in the context of census adjustment disputes.

In this case, there is nothing in the record that establishes whether the undercounted people are voters or nonvoters. If for example, a corrected count added a large number of people to State "A" and increased "A's" number of representatives but the added people were nonvoters, then arguably, the voters of State "B," that lost a representative, suffered a loss of voting strength. The voting power of the voters in State "B" would be diluted because fewer numbers of voters would be electing more representatives in State "A" than in State "B." Such a result contradicts the "one man, one vote" principle.

If respondents base their argument on the right to voter equality, then they should be required to connect voters to the census or explain why such a connection is not necessary. They make no attempt to do either.

For the reasons stated above and in Oklahoma's Brief on the Merits, the Second Circuit Court of Appeals' decision should be reversed and the Secretary's decision not to adjust the 1990 census should be upheld.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER STATE OF WISCONSIN

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STATE OF OKLAHOMA, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

UNITED STATES DEPARTMENT
OF COMMERCE, et al., *Petitioners,*

v.

CITY OF NEW YORK, et al., *Respondents.*

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SUMMARY OF ARGUMENT

Respondents leave unanswered the difference between review of census procedures claimed to be constitutionally proscribed and the affirmative recognition of constitutionally mandated census innovations claimed necessary to achieving the most accurate census practicable. Respondents' brief is notably silent regarding Congress' express constitutional authority to determine how best to take the census. The respondent states also fail to discuss their ability to "correct" the inequalities alleged to exist in their own congressional and legislative districts through the use of the adjusted block-level census data ordered released by the district court more than two and a half years ago.

Respondents expand the court of appeals' error by attempting to engraft a redistricting standard of "good faith" onto census decisions, without discussion or analysis of this standard in Art. I, § 2 cases. This allows respondents to transform a standard of review of census decisions for consistency with constitutional language and the constitutional goal of equal representation, *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2777 (1992), into an open-ended inquiry into subjective purpose. Much of respondents' factual argument is answered by the district court's findings that the Secretary's decision was neither arbitrary nor capricious. Equally important is respondents' misapplication of Art. I, § 2 precedent. A redistricting plaintiff bears the threshold burden of demonstrating the ability to achieve smaller population deviations than those resulting from the challenged plan. *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983). Neither the district court nor the court of appeals found, and respondents could not demonstrate, that the statistical estimates enabled the Secretary to improve, and not simply change, the apportionment of Congress.

ARGUMENT

I. RESPONDENTS HAVE FAILED TO PRESENT ANY PRINCIPLED BASIS FOR RECOGNIZING CLAIMS THAT SPECIFIC CENSUS INNOVATIONS ARE CONSTITUTIONALLY MANDATED.

Wisconsin argued in its opening brief that where the procedures selected for taking the census are not claimed to be constitutionally proscribed, and at least where they do not represent a retreat from prior efforts to achieve census accuracy, the failure to adopt additional census innovations--in particular, previously untried procedures, having the potential for introducing significant errors into the counts and implicating serious issues of policy and legality--should be held not to violate the Constitution. Specifically, the decision whether to employ statistical estimation procedures to "correct" the results of the enumeration census is not mandated by the Constitution, but represents a legislative judgment to be made by Congress or, to the extent Congress has delegated its authority over census decisions, the Executive Branch.[1]

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[1]Whatever the similarities between methods of imputing residents of known housing units and statistical estimation of the entire population and its distribution, *see* Respondent's Brief at 4-5, a method of multiplying statistically derived fractional adjustment factors times every person actually counted in the census has never been used to apportion Congress. It may be noted that the district court case cited by respondents regarding imputation, *Orr v. Baldridge*, No. IP 81-604-C, Order and Memorandum Entry (S.D. Ind. filed July 1, 1985), found that "hot deck" imputation was not sampling, and therefore not barred by 13 U.S.C. § 195, prohibiting the use of sampling as part of the apportionment census.

In this brief, references to the Brief of Petitioner State of Wisconsin are given as "Wisc. Br.;" references to the Brief for the Federal Petitioners are given as "U.S. Br.;" references to the Brief of Respondents are given as "Resp. Br.;" references to the *Amicus Curiae* Brief of the Lawyers' Committee for Civil Rights Under Law, the

It is not that efforts should not be made to reduce or eliminate the unintended errors that are inherent in census-taking. Rather, constitutional text and history, this Court's precedent, logic and common sense reveal that a judicially enforceable right to procedures claimed necessary to achieving the "most accurate census practicable" (J.A. 48) lacks meaningful constitutional content, conflicts with Congress' express constitutional authority to direct the manner of taking the census and results in an untenable system of census governance. The recognition of claims to mandated census innovations has spawned two decades of protracted litigation, which, for having failed to improve equality, has succeeded in transforming a process intended to confer finality in the decennial reallocation of rights of political representation into one of recurring and prolonged uncertainty, and potentially, of upheaval. Respondents' brief cannot be regarded as offering any principled discussion of these issues.

1. Respondents leave wholly unanswered how the recognition of a judicially enforceable entitlement to specific census innovations can be reconciled with Congress' express constitutional authority to direct the manner of taking the census.[2] U.S. Const., art. I, § 2,

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American Civil Liberties Union, the American Jewish Committee, the NAACP Legal Defense and Educational Fund, Inc., the New York Civil Liberties Union and the Puerto Rican Legal Defense and Education Fund, Inc. in Support of Respondents are given as "Lawyers' Comm. Br.;" references to the Joint Appendix are given as "J.A.;" references to "Pet App." are to the Appendix to Petition for Writ of Certiorari in No. 94-1614.

[2]*Amici* supporting respondents suggest an institutional basis for rejecting the Constitution's allocation of census decisions to Congress, arguing that the "majoritarian branches" are inherently indifferent to an accurate count of minority populations. Lawyers' Comm. Br. at 6. The reality is that the "majoritarian branches" represent states, both in the election of Congress and the election of the President. The seven states that were plaintiffs in this action elect 158, or more than 36%, of the 435 voting Representatives to the House of Representatives and,

cl. 3. Nor do they dispute the inherently legislative nature of decisions regarding the best way of conducting the census.

2. Respondents leave largely unanswered the difference in review, under a standard of consistency with constitutional language and the constitutional goal of equal representation, *Franklin v. Massachusetts*, 112 S. Ct. at 2777, between decisions to adopt census procedures claimed to be constitutionally proscribed and decisions *not* to include specific methodological innovations claimed capable of improving census accuracy. Respondents suggest that under the court of appeals' decision, only census procedures for which "a systematic demonstration of a technique to improve overall accuracy" can be made will be constitutionally mandated. Resp. Br. at 67 n.30. Respondents go on to suggest that "only the [Census] Bureau itself is ever likely to be in a position to make such a demonstration," *id.*--a suggestion that is singularly unconvincing coming from those of the respondents to have pursued seven years of additional litigation to compel statistical estimation of the 1980 census after the Census Bureau concluded that adjustment was not feasible. *See Cuomo v. Baldridge*, 674 F. Supp. 1089 (S.D.N.Y. 1987). The better analysis of the limits of claims to the adoption of additional census innovations is to assume that a census plaintiff *would* be capable of demonstrating a specific procedure's ability to improve the "overall accuracy" of the count. In many cases, all that would seem required would be an expansion of procedures already employed by the

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with respondent District of Columbia, 175, or nearly a third, of the 538 Electors to the Electoral College. Because states have an interest in having their minority populations counted in the census, there is no reason to assume the majoritarian process incapable of, or indifferent to, identifying and correcting census errors. Indeed, this case demonstrates the interest of some states to have residents counted in the census, whether or not they exist. The concerted efforts undertaken during the 1990 census to count minorities further belie this supposed institutional indifference.

Census Bureau. If a plaintiff *could* demonstrate that establishing toll-free telephone numbers to answer census questions in 30 non-English languages would produce more accurate totals than establishing lines in eight languages (*cf.* Pet. App. 15), or that an October 1 census would be more accurate than one taken April 1, in the constitutionally relevant sense of providing the population totals and distributions used to allocate representational rights over the next ten years (which it almost certainly would), or that expanding the Bureau's census awareness campaigns or targeted outreach programs or hiring additional enumerators fluent in Korean or Arabic would improve the overall count, then under a theory of constitutionally mandated census innovations, it would violate the Constitution not to do any of these.[3]

There are two related points, neither of which respondents answer. First, many census procedures seem to be wholly consistent with constitutional language and the goal of equal representation, even though additional procedures may be known to be capable of producing better counts. An April 1 census date seems entirely constitutional, as would a decision in 1960 to continue door-to-door rather than mailed enumeration. *See* Resp. Br. at 3-4. Second, the recognition of entitlements to procedures claimed necessary to taking the most accurate census practicable does not invoke an administrable

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[3]Respondents' suggestion of multi-district litigation or similar procedures to resolve multiple claims to specific census innovations, Resp. Br. at 60, underscores the inherently legislative character of deciding the best methods for taking the census and the lack of administrable standards of constitutionality for a court attempting to make that decision. A court adjudicating multiple claims to methods for improving the census would be called on to decide, not simply which innovations have the potential for improving census accuracy, but the best mix and level of innovations--the optimal number of canvassers to be hired who are fluent in non-English languages, the appropriate simplification of census forms, the correct size and stratification of any post-census samples used to derive statistically estimated corrections, the scope of targeted outreach.

standard of constitutionality. Whatever procedures are adopted, additional procedures could always be added that would make the census still more accurate.

3. The absence of meaningful standards of constitutionality is still more problematic where the innovation advanced promises uncertain improvements in census accuracy and holds the potential for introducing its own distortions in the counts. Unless racial and ethnic coverage rates are known to be uniformly distributed across all states--non-Hispanic whites living in Massachusetts having the same chance of being counted in the census as non-Hispanic whites living in Texas--confirming the existence of the differential undercount is not enough to know whether its errors will result in actual representational inequality, either at the state or national level. It is certainly insufficient to allow a court to determine that a specific post-census sampling procedure will be capable of correcting these errors without introducing new errors. The texture of the PES estimates was much more complex than is captured in the term, "differential undercount." If the PES is to be believed, Massachusetts' undercount was roughly one-seventh the size of Montana's, Idaho's or Wyoming's; Pennsylvania's, less than one-fourth; New Jersey's, Illinois's and Michigan's, one-half (Administrative Record ("A.R.") App. 10 (June 13, 1991, Release), Table 1). Every state in the Northeast and Midwest had undercounts below the national average (*id.*). Blacks living in Milwaukee had lower undercounts than non-Hispanic whites living in Los Angeles. H. Hogan, *The 1990 Post-Enumeration Survey: Operations and Results*, American Statistical Association, 1991 Proceedings of the Social Statistics Section, 1, 10. Milwaukee, home to roughly three-fifths of Wisconsin's African-American residents, had an undercount half that of Madison (A.R. App. 10 (June 13, 1991, Release),

Table 2).[4] None of these results is implied by the existence of a differential undercount.

4. Respondents elect not to comment on the upheaval in state redistricting threatened by a system of census governance in which competing statistical definitions and measurements of census accuracy remain the province and focus of litigation years after the census has been completed and reported.

5. Respondents neither mention nor offer any principled basis for resolving the conflict between the Sixth and Seventh Circuits' decisions in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992), and the Second Circuit's decision. Respondents identify intrastate districting inequality as an unconstitutional consequence of adherence to the enumeration census, Resp. Br. at 27-28, but do not discuss their ability to use non-census data to redistrict if the numbers represent "'the best population data available.'" *City of Detroit*, 4 F.3d at 1373 (quoting *Karcher v. Daggett*, 462 U.S. at 738). Significantly, the respondent states fail to explain why they have tolerated the inequality that they allege exists in their own congressional and legislative

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[4]The ability of the PES to worsen equality of representation in intrastate districting is seen in the mis-estimation of the populations of Madison and Milwaukee, Wisconsin. The June 1991 PES estimate of Madison's undercount was 2.565%. Milwaukee's was 1.234%. Revised estimates published a year later reversed the two cities' undercounts, showing Madison with an estimated undercount of 1.156%, compared to 2.298% for Milwaukee. U.S. Department of Commerce, Bureau of the Census, *Report of the Committee on Adjustment of Postcensal Estimates: Assessment of Accuracy of Adjusted Versus Unadjusted 1990 Census Base for Use in Intercensal Estimates* (Aug. 7, 1992) ("CAPE Report"), Attachment 11, page 3. Had the PES totals been used in state redistricting, Milwaukee residents would have been placed in too large districts, and Madison residents in too small.

districts, where, for more than two and a half years, adjusted block-level data have been available for drawing new districts (Pet. App. 94).[5]

II. THE SECRETARY'S DECISION WAS CONSTITUTIONAL.

1. Census procedures may be employed which generate alternative census totals, although in this case, two sets of census numbers would not have been produced, but for the district court's recognition of a judicially enforceable right to census innovations claimed necessary to achieving the most accurate census practicable (Pet. App. 67, 108-09, 123, 133-34). The availability of competing census totals opens the possibility that the

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[5]Wisconsin regards respondents' silence in the face of the statement in its opening brief that it is not aware of any of the respondent states' having used the adjusted population data to redraw their congressional or legislative districts, Wisc. Br. at 44 n.36, as a concession that they have not. If respondents' actions, rather than their words, are considered, Art. I, § 2 is interpreted as permitting states to retain districts drawn using the best census data available at the time of redistricting--in the case of 1991 and 1992 redistricting, the 1990 census--even though better data subsequently become available. This may, in fact, represent the correct interpretation of Art. I, § 2's requirements. *Cf. Karcher v. Daggett*, 462 U.S. at 738 ("because the census count represents 'the best population data available' . . . it is the only basis for good-faith attempts to achieve population equality"). But if this is the correct interpretation, the same rule, applied to the apportionment of Congress, would mean that the existing apportionment is constitutional, since the adjusted state population totals were also not available at the time of apportionment. While state congressional redistricting is governed by a standard of precise mathematical equality, *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969); *Karcher v. Daggett*, 462 U.S. at 734, this standard is illusory for the nation as a whole. *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 463 (1992). There is no logic in seeking to compel a reapportionment of Congress, six or more years into the decade, on the ground that new census numbers are claimed now to represent the "best population data available" for apportionment, if, under Art. I, § 2's much higher standard, states may constitutionally retain districts drawn before the new data were available.

selection of one set may be claimed inconsistent with the Constitution, not because the procedures producing the numbers violated any constitutional standard in and of themselves,[6] but because the alternative numbers are alleged to produce a better apportionment of Congress. This possibility was suggested in *Franklin v. Massachusetts*, where the Court referred to the appellees' failure to demonstrate that the exclusion of overseas personnel from the states' population totals would make representation in Congress more equal, citing the Art. I, § 2 redistricting standard that plaintiffs challenging a state redistricting plan bear the burden of proving avoidable population inequalities. 112 S. Ct. at 2778 (citing *Karcher v. Daggett*, 462 U.S. at 730-31).

The Second Circuit attempted to apply Art. I, § 2's standard requiring states to make a "'good-faith effort to draw districts of equal population'" (Pet. App. 37 (quoting *Karcher v. Daggett*, 462 U.S. at 730-31)), in assessing the constitutionality of the Secretary's decision. Much of respondents' brief is also devoted to demonstrating that the Secretary did not approach the adjustment decision in "good faith"--or what seems more strongly suggested by respondents' extensive discussion of facts not mentioned or relied on by either court below, to demonstrating that the

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[6]Respondents argue the Secretary's failure to give weight to the numeric accuracy of the adjusted counts as inconsistent with the constitutional constraint that no more than one Representative be apportioned every 30,000 people. Resp. Br. at 53 n.23. The point would be apposite if what was at issue were the results of the 1790, rather than 1990, census, or if the House of Representatives had on the order of 8,000 members. The argument represents an awkward attempt to buttress the Second Circuit's error in concluding that the Secretary's failure to "make the required effort to achieve numerical accuracy as nearly as practicable" compelled review under a heightened standard of scrutiny (Pet. App. 39).

Respondents choose not to address the conflicts between constitutional text and principles and specific aspects of the PES argued in Wisconsin's opening brief. *See* Wisc. Br. at 40-43.

case should be remanded for further proceedings to determine whether good faith was in fact exercised.[7]

Part of the answer to respondents' argument that an absence of good faith is demonstrated by the Secretary's purported usurpation of the Census Bureau's census authority is that constitutionally, the authority to decide how to conduct the census lies with Congress, which has in turn broadly delegated the authority over decisions regarding the form and content of the census to the Secretary of Commerce, subject to congressional oversight. 13 U.S.C. § 141(a), (f). Congress has also vested the President with the final authority to report the states' populations and the new apportionment of Congress, 2 U.S.C. § 2a, directing the Secretary to report the results of the apportionment census to the President by December 31 of the census year. 13 U.S.C. § 141(b). That a decision whether to go forward with the first-ever nationwide estimation of the apportionment census would not be left to a professional bureaucracy, where the results of the estimation process could not be completed until after Congress had been reapportioned, Certificates of Entitlement sent to the states, and state redistricting begun, seems hardly unusual, let alone, unconstitutional. Another answer to respondents' argument is that they stipulated to the Secretary's redeciding whether to adjust the census, just as they stipulated to the appointment and method of appointment of a Special Advisory Panel, and to the Secretary's deciding whether to adjust based on a set of future guidelines articulating the technical and policy grounds on which the decision would be reached

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[7]Towards the end of their brief, respondents explicitly ask for a remand different from that ordered by the court of appeals, suggesting that the court's remand "would be appropriate to permit the Secretary to redetermine the comparative accuracy of the two counts under a constitutionally permissible definition of distributive accuracy." Resp. Br. at 57. *Amici* supporting respondents are still more direct, arguing that on remand the district court should now determine whether the Commerce Secretary acted in good faith to ensure a census that was as accurate as practicable. Lawyers' Comm. Br. at 18-20.

(J.A. 61-67). As one of forty-three states not invited to nominate any members of the Special Advisory Panel, and as a state not asked to stipulate to a post-census survey that would estimate its population based on sample observations taken primarily in other states, *see* Wisc. Br. at 6, 41-42, Wisconsin finds little sympathy for respondents' sense of injury.

With respect to respondents' argument that the Secretary evaluated the distributive accuracy of the census under irrational criteria, the district court found the Secretary's evaluation of the errors introduced through estimation to have been reasonable (Pet. App. 71-84).[8] If the Secretary's analysis had been irrational, then the district court's findings under an arbitrary and capricious standard would have been wrong. Respondents did not challenge the district court's findings that the decision was not arbitrary or capricious on appeal, even if they appear to be doing so in this Court. In addition, the Secretary plainly considered factors affecting the accuracy of the adjusted numbers bearing on census uses.[9]

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[8]For arguing that the Secretary's refusal to follow the recommendations of the Director of the Census Bureau and Census Bureau staff evinced a lack of good faith, respondents fail to mention that the Bureau's Director also stated in her recommendation that adjustment was an issue as to which reasonable men and women and the best statisticians and demographers could disagree (J.A. 73). Respondents also do not mention that both the Under Secretary for Economic Affairs and Administration and the Administrator of the Economics and Statistics Administration recommended against adjustment (Pet. App. 59).

[9]As summarized in Wisconsin's opening brief, Wisc. Br. at 8-10, these included evidence casting significant doubt on the homogeneity assumption underlying the entire estimation procedure; the sensitivity of the estimates to variations in modeling assumptions, particularly as affecting the apportionment of Congress; bias introduced through procedures used to "smooth" the raw adjustment factors; the necessity of imputing a significant number of unresolved sample/census matches, and significant measured bias in the estimates. *See also* U.S. Br. at 13-19. The Secretary also expressed concern that the estimates had

2. The greater problem in respondents' argument is that it simply treats the concept of "good faith," engrafted onto census decisions by analogy to Art. I, § 2 redistricting, as an open-ended standard of subjective purpose.

As argued in Wisconsin's opening brief, and again unanswered by respondents, "good faith" in redistricting reflects the objective feasibility of achieving smaller population deviations in a state plan, rather than the state's purpose in adopting a plan. If a redistricting plaintiff is able to put forward a plan that achieves smaller population deviations than the state's plan, the state plan fails. If the redistricting plaintiff is unable to demonstrate the ability to draw districts with smaller population deviations, his claim fails. *Karcher v. Daggett*, 462 U.S. at 731 ("if [redistricting plaintiffs] fail to show that the differences could have been avoided the apportionment scheme must be upheld"). The claim does not become better because the state relied on a particular statistician, assisted by a single graduate student, *cf.* Resp. Br. at 37 n.17, to develop its plan, or because the state legislature adopted a plan after "undelegating" the authority of a non-partisan redistricting commission.

Applying these principles to the census, if one set of census totals produced an incorrect apportionment of Congress, and another set produced the correct, or at least a "better," apportionment, the deliberate choice of the totals resulting in the worse apportionment would be inconsistent with the goal of equal representation. The decision not to use available numbers resulting in a better apportionment would be analogous to a state's failure to create equal population congressional districts, where

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been generated under severe time constraints employing cutting edge statistical techniques, creating the risk that a decision to adjust might be based on research conclusions later reversed (Pet. App. 248). The subsequent discovery of two errors in the PES accounting for nearly a fourth of the original undercount estimate (Tr. 1786-87, 1790-91; DX 31) confirmed the validity of this concern and its bearing on census uses.

smaller population deviations could have been achieved by adopting a different redistricting plan. As in Art. I, § 2 redistricting, "good faith" in the selection of census results would reflect objective feasibility. If alternative census numbers could not be determined to improve the apportionment of Congress, the decision not to use them would be at least "consonant with, though not dictated by" the goal of equal representation. *Franklin v. Massachusetts*, 112 S. Ct. at 2778. And if "better" numbers were not available at the time of apportionment, the failure to use them would not be inconsistent with constitutional language or the goal of equal representation. *See* n.5, *supra*. Where the relief sought is of no less moment than a judicially mandated reapportionment of Congress, the threshold burden imposed on census litigants should be no lower than that imposed on redistricting plaintiffs.

3. Respondents failed to demonstrate the Secretary's ability to make representation in Congress more equal by substituting the PES estimates for the enumeration census. Had respondents been able to make this showing, we would expect a much earlier, more forceful and more direct statement in their brief, repeated with as much frequency as they invoke the differential undercount, that the apportionment of Congress under the enumeration census was wrong and that the apportionment under the PES was at least "better," if not correct. Instead, respondents describe adjustment as "promot[ing] the goal" of equal representation for equal numbers of people, Resp. Br. at 66, or as an elephant that is larger than a horse, but smaller than a whale. *Id.* at 62.

Roughly a third of the way through their brief, respondents announce for the first time that Congress was malapportioned under the enumeration census, writing:

> The PES results showed too that the uncorrected census counts led to a malapportionment of the House of Representatives, with two seats erroneously assigned to Wisconsin

> and Pennsylvania that should *in fact* have gone to California and Arizona, respectively.

Resp. Br. at 27 (emphasis added).

It is very hard to find in respondents' brief, where this "fact" is demonstrated.[10] Neither the district court nor the court of appeals found that the PES apportionment gave either the correct apportionment or one better than the enumeration apportionment. The district court expressly found that respondents had failed to illustrate affirmatively the superior accuracy of the estimates at "any level mentioned in Guideline One [national, state or local], or . . . for any reasonable definition of accuracy" (Pet. App. 78).[11] The court of appeals described the adjusted numbers as resulting in an apportionment which

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[10]No record cite is given. Immediately following this assertion, respondents discuss the impact of estimated census errors on equality of representation in intrastate redistricting. *See* Resp. Br. at 26-27. Seven pages later, respondents identify the "final loss function analysis" as also showing "that the unadjusted counts are expected, approximately, to malapportion two more seats in the House of Representatives than are the adjusted counts." *Id.* at 33. Yet the same loss function analysis is later cited as showing Wisconsin's loss of a House seat to California, *id.* at 62 n.26, not Pennsylvania's loss and Arizona's gain of yet another seat. Loss function analysis is discussed at n.13, *infra*.

[11]Respondents rewrite the district court's decision to make the word "any", used twice, read "every." Resp. Br. at 46 ("The court's point was that guideline one required an affirmative showing of superior accuracy of the adjusted counts at *every* level and for *every* reasonable definition of accuracy . . . ." (emphasis added)). Wisconsin interprets the district court's statement as meaning what it says. While the district court found itself to favor the adjusted numbers, it recognized that an affirmative demonstration of their superiority at the national, state and local level had not been made. While not citing the burdens of proof in Art. I, § 2 redistricting cases, the court's finding was consistent with the Art. I, § 2 threshold standard requiring a redistricting plaintiff to demonstrate affirmatively the ability to draw districts with smaller population deviations.

was "just as accurate" as the President's apportionment, not in a better apportionment (Pet. App. 38).[12]

Thirty-five pages after announcing that Wisconsin and Pennsylvania were apportioned House seats "in fact" belonging to California and Arizona, respondents argue that California was in fact entitled to a seat apportioned to Wisconsin. Resp. Br. at 62. Here, respondents are more explicit in identifying the evidence they believe supports the claim.[13] It is natural to wonder what happened to

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[12]The court of appeals' statement that the Secretary had declined to make the adjustment "if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate" (Pet. App. 38), becomes, in respondents' brief, a statement by the court that the Secretary had declined to adjust "if there were any distributive consequence with respect to which an adjusted census 'would be different from . . ., although just as accurate,' as the unadjusted." Resp. Br. at 68 (quoting Pet. App. 38). For respondents, the apportionment of Congress is treated as "any distributive consequence[ ]" of the adjustment decision.

[13]Respondents note Wisconsin's loss of a seat to California under Professor Wachter's recalculation of state population estimates using modified modeling assumptions. Resp. Br. at 62 (*see* A.R., App. 3, K. Wachter Report, Table 2.1.). Wachter's estimates, in addition to being point estimates, were based on the PES data. Wachter did not take a new sample. At the time of the adjustment decision, PES data were known to contain significant measured and unmeasured bias. Correction of two subsequently discovered errors reduced California's population estimate by nearly 275,000 (DX 31, Attachments 2, 4). That flawed estimates were "robust" with respect to two states' apportionments hardly demonstrates that this gave the correct apportionment. The more important result of Wachter's calculations is that even if problems of bias and sampling error were ignored, the ability of statistical estimation to improve the apportionment of Congress was shown to be constrained by its extreme sensitivity to modeling assumptions.

Respondents also identify the Census Bureau's loss function analysis as "show[ing] that the unadjusted counts malapportion two seats more in the House of Representatives than do the adjusted," which they then suggest represent the "same seat from Wisconsin to California." Resp. Br. at 62 n. 26. Loss function analysis attempted to

Arizona, particularly given its status as the only respondent state capable of claiming additional representation under the statistical estimates.[14]

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measure the relative accuracy of the PES and enumeration census by comparing their results to a hypothetical "true" population distribution, referred to as the "target population" (Pet. App. 187-89; PX 42). The essence of the apportionment loss function procedure was to treat the target populations as giving the correct apportionment and then to compare this to the census apportionment and to multiple apportionments given, not by the PES population estimates, but by 1,000 simulations of the states' populations based on the PES. As noted in the Secretary's decision, this had the effect of eliminating the inaccuracies derived from using one particular set of adjustments (Pet. App. 189-90), even though, had the Secretary decided to adjust, only one set of adjustments necessarily could have been adopted. The actual apportionments given by the simulations were not reported, so it is not possible to know which states would have gained or lost representation (*see* PX 42, Tables 1, 2). The main point to be made is that the hypothetical "true" populations were not, and were known not to be, the true "true" populations. The generation of the target population "parcelled out" measured bias in the PES using 13 very broad categories called evaluation strata (Pet. App. 187). Moreover, the target population could not have corrected for the two subsequently discovered errors, accounting for nearly a fourth of the undercount estimate, since these were not known at the time. The consequence of this last fact is evident in a comparison of the states' hypothetical target populations and their population estimates after correction for the two errors. California's target population shown in PX 43, Table 1, was more than 250,000 higher than its corrected estimate; Arizona's target population was nearly 50,000 higher than its corrected estimated total; Wisconsin's target population was 22,000 less than its revised estimate (DX 31, Attachment 2).

[14]Respondents argue that there is no significance in the fact that California elected to be bound by the district court's judgment, stating that it would be an "odd consequence" for state residents to be put in a worse position "if their State joined their suit than if the State never participated at all." Resp. Br. at 62 n.27. There is nothing odd about the fact that a judgment binds a state which decides to join, or in the case of California, to initiate (J.A. 40 ¶ 10) a lawsuit, even though the state would not be bound if it had never commenced the action. That the right of apportionment in Congress is fundamentally a state right follows from the language of Art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States which may be included within

The June 1991 estimates that purportedly showed Arizona's and California's entitlement to additional representation in Congress were subsequently found to contain two errors, accounting for nearly one fourth of the original undercount estimate. *See* Resp. Br. at 35 n.14. The correction of these errors also changed the state population estimates. The revised estimated population totals for the four states whose apportionments are at issue were: California, 30,596,258; Pennsylvania, 11,916,496; Wisconsin, 4,921,509; Arizona, 3,745,518 (DX 31, Attachment 2).[15] Under the method of equal proportions, the four states' priority values to a fifty-third, twenty-first, ninth and seventh House seat, respectively, would have been: California, 582,812; Pennsylvania, 581,465; Wisconsin, 580,005; Arizona, 577,946.[16] What this reveals

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this Union . . . .") and Section 2 of the Fourteenth Amendment ("Representatives shall be apportioned among the several States according to their respective numbers . . . ."). It is also reflected in the apportionment statute, 2 U.S.C. § 2a(b) ("Each State shall be entitled . . . to the number of Representatives shown" in the Presidents' apportionment statement).

[15]To simplify the calculations, only the states' estimated resident populations are used. The calculation of the states' apportionment priorities would require including overseas personnel allocated to their apportionment counts. The 1990 overseas populations for the four states were: California, 79,229; Pennsylvania, 43,067; Wisconsin, 14,976; Arizona, 12,757. Source: *United States Department of Commerce News*, CB91-07 (Jan. 7, 1991), Table 5. Including overseas populations in the states' counts does not change the results shown in the text.

[16]The apportionment of Congress is given by the procedure known as the method of equal proportions. 2 U.S.C. § 2a(a). State priority values are calculated by dividing each state's population by the square root of the product of the number of the state's last House seat apportioned, times the number of the next seat sought. *See Montana*, 503 U.S. at 452 n.26. The divisor for determining California's priority to a fifty-third House seat is therefore the square root of the product of 52 and 53, or 52.497618; the divisor for Pennsylvania's claim to a twenty-first Representative is the square root of 20 times 21, or

is that the basis of Arizona's claim to a seventh House seat, originally resting on a single methodological decision regarding the treatment of sample variances during "smoothing" (Pet. App. 220), rests on the existence of two undiscovered PES errors. This does not represent "a substantive principle of commanding constitutional significance." *Montana*, 503 U.S. at 463.

It also reveals that if the corrected estimates represented the states' "true" populations, the Secretary could not have improved equality of representation in Congress by substituting the PES estimates available at the time of his decision for the enumeration census. California's purported malapportionment under the census would have been exactly offset by Pennsylvania's malapportionment under the PES.

The calculation also shows that if the corrected point estimates represented the states' "true" populations, California and Pennsylvania would have higher priority than Wisconsin to the two contested House seats. *See also* U.S. Br. at 18-19. But as respondents note, "[b]ecause it is based on a sample, the PES is inevitably affected by sampling error . . . . " Resp. Br. at 31. Within margins of error equal to plus or minus two times the states' reported standard errors (Tr. 2373-74), any of the three states could occupy the high, middle or low priority to the two contested seats.[17] Except by ignoring random sampling error,

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20.493901; the divisor for Wisconsin's claim to a ninth Representative is the square root of 8 times 9, or 8.4852813; the divisor for Arizona's priority to a seventh seat is the square root of 6 times 7, or 6.4807406.

[17]The revised standard error for California was reported to be 119,228; for Pennsylvania, 57,736; for Wisconsin 19,642 (DX 31, Attachment 2). Somewhat larger margins of error were reported with the June 1991 estimates (A.R. App. 10 (June 13, 1991, Release), Table 5 (state margins of error reported as percentages of estimated national population of 253,978,000: California, 0.1152% (292,583); Pennsylvania, 0.0484% (122,925); Wisconsin, 0.0161% (40,890)). Adding two times Wisconsin's revised standard error to its point estimate would make its population 4,960,793. Dividing this number by the square root of 72

California could not claim an additional seat in Congress, whether from Wisconsin or Pennsylvania.

There were, however, other serious sources of error in the estimates. Measured bias was found to account for one-third of the original undercount estimates (Pet. App. 180).[18] Other sources of non-sampling error, see n. 9, supra, warranted "escalating skepticism" (Pet. App. 78) of the PES results.

In sum, the PES did not endow the Secretary with the ability to improve the apportionment of Congress, but only to change it. The goal of equality of representation does not mandate that substantial evidence of sampling and non-sampling error be ignored or that a process as complex as the PES, executed under severe time constraints, be assumed not to hold errors not immediately apparent. To compel a change in the census five years after the apportionment of Congress can accomplish no more than an arbitrary reallocation of rights of political representation, at the cost of throwing state redistricting, and the ability of the states' citizens to elect representatives under established districts, into turmoil. Arizona's claim to additional representation in Congress is based on undiscovered errors in the PES. The claim of California, which elected not to appeal the district court's

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would give Wisconsin a priority value of 584,635 to a ninth House seat. This is higher than Pennsylvania's and California's priorities to a twenty-first and fifty-third seat, respectively, calculated using the states' point estimates. *See* pages 16-17 and n.16, *supra*. Subtracting two times California's standard error from its point estimate would make its population 30,357,802. Dividing this number by the state's equal proportions divisor for a fifty-third Representative would give a priority value of 578,270--below both Pennsylvania's and Wisconsin's point estimate priority values.

[18]Bias remained after the recalculation of the population totals following the correction of the two late-discovered errors. *See* CAPE Report at 15 (noting that between 22% and 45% of the revised undercount estimate of 1.58% actually reflected measured bias and not measured undercount); *see also* 58 Fed. Reg. 69, 75 (Jan. 4, 1993) (bias-corrected undercount estimated to lie between 0.9% and 1.2%).

judgment, would require sampling error to be ignored, as well as multiple sources of non-random error. The other respondent states are unable to claim additional congressional representation under the adjusted numbers. Respondents do not have an interest in compelling other states' redrawing their congressional and legislative districts. The respondent states' commitment to correcting the inequalities alleged to exist in their own districts is belied by their failure to draw new districts using the adjusted block-level data ordered released by the district court. This case does not involve protecting constitutional rights, but disregarding the express language of the Constitution, this Court's census and redistricting precedent and the statutes enacted by Congress directing the manner of taking the census.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN, PETITIONER

v.

CITY OF NEW YORK, ET AL.

STATE OF OKLAHOMA, PETITIONER

v.

CITY OF NEW YORK, ET AL.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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Respondents concede (Br. 66-67) that in conducting the 1990 census, the Census Bureau made a "good-faith

effort" to achieve both "the most accurate count practicable" and "population equality." Respondents nevertheless contend that the Secretary of Commerce violated the Constitution when he declined to make a statistical adjustment of the census totals. As we explain in our opening brief (at 26-28), however, because the Constitution provides that the decennial census shall be made "in such Manner as they [the Congress] shall by Law direct," Art. I, § 2, Cl. 3—and because Congress in turn has assigned to the Secretary the responsibility for conducting the census "in such form and content as he may determine," 13 U.S.C. 141(a)—there is no basis for a court to compel revision of a census that was reasonably calculated to enumerate the Nation's population within a fair range of accuracy and that in fact counted 98.4% of the people. In particular, because respondents acknowledge that the census headcount was conducted in good faith, they have wholly failed to make the threshold showing that would be required under *Karcher* v. *Daggett*, 462 U.S. 725 (1983), to trigger heightened scrutiny of the Secretary's decision not to publish *other*, statistically adjusted population totals. See U.S. Br. 41. Thus, even assuming that the court of appeals correctly imported the *Karcher* framework into this quite different setting (but see U.S. Br. 39-40 & n.30) respondents' constitutional claim is without merit (see *id.* at 39-45).

In light of the fundamental soundness of the census itself, resolution of this case does not require a detailed analysis of respondents' various technical disagreements with the Secretary's judgment that a statistical adjustment was unwarranted. In any event, respondents' arguments lack merit. Respondents suggest that experts uniformly favored a statistical adjustment to the 1990 census and that the Secretary disregarded that consensus. In fact, numerous statistical experts, both inside and outside

the government, concluded that the proposed adjustment was not warranted, and many who supported adjustment recognized that reasonable statisticians could disagree. The Secretary's decision was based on a thorough and reasoned analysis of the competing views. The Secretary is charged by statute with conducting the census, and it is his decision—including his determination that the superior accuracy of the adjusted 1990 census figures had not been proved—to which the courts must defer. Respondents' invocation of the Constitution does not diminish the deference owed to that decision.

A. Respondents' principal argument (Br. 58) is that " 'technical expertise' with respect to the census rests within the Bureau," and that "[t]he Secretary's decision, without contributions from nor review by the expert Bureau, was made in derogation of that technical expertise." Those contentions mischaracterize the record.

1. First, no expert consensus existed as to the advisability of adjusting the census: there was substantial disagreement on the issue within the professional community,[1] and the Secretary had access to a number of experts who were not persuaded that adjustment would improve the distributive accuracy of the census.[2] Within

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[1] Indeed, questions concerning the feasibility of adjustment had been raised from the outset. A March 3, 1988, letter sent by 11 professors of statistics and two professors of mathematics to the House Subcommittee on Census and Population stated that "[s]o far, the technical case for adjustment is weak." DX 89, at 2. The letter stated that "adjustment can easily introduce more mistakes than it fixes," and warned that "[o]ne egregious tactic" employed by some adjustment proponents "is to assert that there is a consensus of technical opinion favoring adjustment." *Id.* at 1, 2.

[2] Respondents give a highly one-sided account of the post-enumeration survey and the adjustment process. Thus, respondents downplay the significance (and problematic nature) of the "homo-

the Census Bureau, Peter Bounpane and Charles Jones had a combined 57 years' experience in the planning and

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geneity assumption" (see U.S. Br. 12-13), contending (Br. 19) that "[t]he assumption [behind post-stratification] was not that [individuals within a post-stratum] would share exactly the same [capture] probability, but rather that [they] would be more similar to one another (with respect to their likelihood of being counted in the census) than to individuals in other post-strata." Respondents' expert agreed at trial, however, with the statement that "[t]here is a further assumption that within each poststratum the probability of capture in the census is the same for all persons." Tr. 1658 (Dr. Stephen Fienberg).

Respondents also assert that "[t]he [post-strata] categories selected were the ones the Bureau had determined in its own research and in its review of research by other specialists to provide the greatest explanatory power in analyzing differences in undercount rates." Resp. Br. 18 (citing Tr. 513-514). The cited transcript pages do not support that proposition, and in fact there was substantial dispute as to whether the combination of variables chosen actually corrected the differential undercount in a way that made the adjusted numbers more accurate. In selecting geographic groupings for post-strata, for example, the Bureau simply employed its pre-existing census divisions. See Pet. App. 373. Dr. Wachter analyzed the results of an experimental re-poststratification, in which all demographic and place-type divisions of post-strata remained the same, but new (and more homogeneous) post-strata were defined by changing the state groupings. Tr. 2133; DX 44. The differences resulting from that experiment were substantial. Tr. 2138-2139; DX 44. In Dr. Wachter's view, those analyses demonstrated that adjustment fails the test imposed by Guideline Three that adjusted counts be robust to reasonable alternatives. Tr. 2142.

Respondents also state (Br. 29) that the Bureau's P-projects "showed that each of the measurable sources of error had been controlled, leaving survey results that could reliably be used to adjust"; but the Secretary explained in detail his disagreement with that conclusion. See Pet. App. 205-213; see also DX 1, at 902 (minority on Undercount Steering Committee was "concerned that the evaluation studies understate the level of error"); Tr. 2112-2125, 2156, 2175. And respondents make no reference to the smoothing and pre-smoothing processes and the uncertainties they introduced (see U.S. Br. 9-12).

evaluation of the census, and each had substantial statistical expertise. See DX 1, at 919, 923; Tr. 1719-1723, 1889-1890. As members of the Undercount Steering Committee, they disagreed with the Committee majority's conclusion that adjustment would improve the accuracy of the census, on the ground that "reasonably complete analyses of results have yet to be performed." DX 1, at 898.[3] The Secretary was also assisted by other statistical experts within the Commerce Department. The recommendation against adjustment of Under Secretary Dr. Michael Darby, Ph.D., was issued as Appendix Six to the Secretary's decision. See DX 1, at 965 *et seq.*[4]

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[3] Respondents state (Br. 34) that "seven of the nine members of the Undercount Steering Committee concluded that the adjusted counts were more accurate than the unadjusted and that the census should be corrected on the basis of the PES." In fact, although the Committee majority "conclude[d] that a statistical adjustment of the 1990 census leads to an improvement in the counts," DX 1, at 898, it made no recommendation concerning an adjustment. One member explained that the Committee did not make a recommendation because "the Census Bureau is a statistical agency" and the ultimate decision whether to adjust "includes other issues as well; legal policy and so on." Tr. 1767. Respondents also state (Br. 34) that the two dissenting members of the Committee "joined in the conclusion that adjustment would be proper for [certain] purposes and groups." The Committee's report stated that the dissenting members "would support the use of adjusted counts in the *intercensal* estimates program, and they believe that an alternative adjustment using the PES data to adjust for post-strata with large measured undercounts *might* be acceptable to them." DX 1, at 898 (emphasis added). The propriety of an intercensal adjustment (which would not affect representation) is not at issue in this case; and the possibility of an acceptable alternative adjustment could be of little relevance to the Secretary's decision, in light of the July 15, 1991, deadline and the pre-specification requirement (see U.S. Br. 6, 18 n.15).

[4] Under Secretary Darby had previously discovered a significant error in the Bureau's methodology, necessitating a correction that

Deputy Under Secretary Dr. Mark Plant, Ph.D., similarly concluded that adjustment "would not increase the accuracy of the census." Plant Dep., Vol. 2, at 19; see also *id.* at 23-24, 315. The Secretary also gave careful attention to the individual recommendations of the eight members of the Special Advisory Panel, four of whom advised against adjustment. See Pet. App. 258-319.[5] In short, there simply was "no consensus among statisticians and demographers that [adjustment] would make the state and district census totals—the level at which the adjustment would actually affect representation and funding—more accurate." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1413 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992).[6]

2. Nor did the Secretary fail to consider the views of those who favored adjustment. After the Undercount Steering Committee prepared its majority and minority

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substantially affected the Bureau's analysis. Tr. 1956-1957; See page 8, *infra*.

[5] Respondents contend (Br. 36-37, 38 n.18) that the four members of the Special Advisory Panel who recommended against adjustment were opposed to adjustment from the time of their appointment, and that "the Secretary failed to explain why a deadlock that was preordained had any bearing on the merits of his decision." The first contention is factually unsupported. See Tr. 2292 (Dr. Wachter testified that at the time of his nomination to the Panel he was "skeptical that adjustment could work" but that he "came to the position, let's * * * see how it all goes out, what will the data show"). And the Secretary did not simply rely on the *fact* of disagreement among the Panel members; he evaluated the competing views, and explained in considerable detail his reasons for finding some members more credible than others. Pet. App. 258-319.

[6] Since the Seventh Circuit's decision in *Tucker*, the scholarly debate has continued. See, *e.g.*, 9 Stat. Sci. 458-537 (1994) (compilation of papers and rejoinders); *Adjusting the Census of 1990: An Exchange*, 34 Jurimetrics J. 59-115 (1993) (compilation of articles).

reports, the Secretary met personally with proponents of both positions within the Census Bureau. DX 75; Tr. 1769-1770, 1908-1909. In his final decision, the Secretary described in extensive detail the adjustment methodology chosen by the Bureau and the arguments in favor of adjustment advanced by Bureau officials and some members of the Special Advisory Panel. Even Bureau officials supporting adjustment acknowledged that the issue was not clear-cut. Thus, Census Bureau Director Barbara Bryant prefaced her recommendation with the observation that "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." J.A. 73. Senior Mathematician Robert Fay similarly supported adjustment but told the Secretary that "reasonable statisticians could differ on this conclusion." Tr. 1909.[7]

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[7] Based on subsequent research, Dr. Fay testified at trial that he no longer advocated the adjustment proposed for the Secretary's consideration in July 1991. Tr. 1920-1921; see U.S. Br. 38. Respondents characterize (Br. 43 n.20) Dr. Fay's testimony as asserting "that, after an additional year of research, he believed other adjustments of greater accuracy could be made." That is not what Dr. Fay said. He testified that he had not made up his mind whether he would favor an adjustment of the 1990 census figures. Tr. 1921. Dr. Fay explained that the Census Bureau's CAPE Committee (see U.S. Br. 4-5) was continuing to consider the question whether a statistical adjustment should be used in computing intercensal population estimates, and that the Committee was "looking earnestly at whether alternative adjustments of the census, avoiding the problems that I have described in my [research] paper, might produce an acceptable means of accounting for undercount as we produce post censal estimates." Tr. 1921. Census Bureau Director Bryant subsequently decided against adjustment of the intercensal figures. 58 Fed. Reg. 70 (1993). In any event, Dr. Fay's willingness (in May 1992) to hold out the possibility that an acceptable adjustment methodology might be devised in the future scarcely casts doubt upon the Secretary's July 1991 decision.

Respondents' contention that the Secretary rejected a settled expert consensus is particularly unpersuasive in light of the uncertain state of the record at the time the Secretary was required to act. The Undercount Steering Committee's June 21, 1991, report estimated that the proportional shares of 11 States would be made worse by adjustment. The loss function on which that estimate was based failed to account, however, for the variability of the estimates created by the smoothing and pre-smoothing processes (see U.S. Br. 9-12), a fact pointed out first by Commerce Department Under Secretary Darby. Tr. 1956-1957; see note 4, *supra*. When that omission was brought to the Bureau's attention, it conducted a second loss function analysis. This time, the Bureau concluded that the proportional shares of 21 States would be made less accurate by adjustment, and that two-thirds of the population resided in States whose shares would be made more accurate. DX 1, at 913; J.A. 81. That conclusion was communicated to the Secretary in an Addendum issued on June 27, 1991, and in Census Bureau Director Bryant's recommendation issued the following day—less than three weeks before the Secretary was required by the stipulation to announce his decision for or against adjustment. See Pet. App. 190; J.A. 70, 81. The Addendum stated that "the overall committee position has not changed regarding adjustment, but has been weakened somewhat." DX 1, at 916. The Addendum also noted that "[w]hen additional information * * * becomes available, the committee acknowledges that it may strengthen or weaken its conclusions." *Ibid.*

The Secretary viewed the revised loss function analysis as still skewed toward adjustment, however, because the variances it used had been understated (by the Undercount Steering Committee's own estimation) by a factor in the range from 1.7 to 3. He determined that, if

the variances were increased by a factor of 2, a figure at the low end of the Bureau's range, "the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy." Pet. App. 191. The Secretary reasonably concluded that "[t]here is certainly not sufficient evidence to reject the distributive accuracy of the census counts in favor of the adjusted counts." *Id.* at 201. He also noted that he was "deeply concerned that if an adjustment [wa]s made, it would be made on the basis of research conclusions that may very well be reversed in the next several months." *Id.* at 248. That concern proved to be warranted. Subsequent research demonstrated that errors (including a computer coding error) had led to a significant overestimation of the net national undercount, with potential consequences for the apportionment of Representatives among the States. See U.S. Br. 4-5, 18-19.[8]

3. Respondents err in suggesting (Br. 58-60 & 61 n.25) that Secretary Mosbacher's lack of statistical training

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[8] If the corrected adjusted figures were used for a reapportionment, Wisconsin would lose a Representative and California would gain one, but the number of Representatives allotted to Arizona and Pennsylvania would remain unchanged. See U.S. Br. 18-19. No party before this Court is in a position to press for an adjustment using those figures, since California chose not to appeal the district court's judgment sustaining the Secretary's decision. See U.S. Br. 19 n.16, 30 n.23. Although governmental respondents that would obtain additional federal funds as a result of an adjustment may satisfy the injury-in-fact requirement for Article III standing (cf. Resp. Br. 63 n.27), they have no judicially enforceable right to an adjustment on that basis because (1) judicial review of the decennial census totals is not available under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (see *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2773-2776 (1992)); (2) those respondents have no constitutional claim of their own (*id.* at 2776); and (3) there is no reason to depart from the usual prudential rule against invoking the constitutional rights of a third party. See U.S. Br. 30 n.23.

affects the deference owed to his resolution of technical issues. The Secretary is directed to "take a decennial census of population * * * in such form and content as he may determine," 13 U.S.C. 141(a), and his authority to "determine" the "form and content" of the census necessarily encompasses the authority to evaluate scientific evidence bearing on the propriety of a statistical adjustment. Respondents cite no authority suggesting that the *curriculum vitae* of a particular agency head bears on the legal standard to be employed by a reviewing court. Cf. *Morgan* v. *United States*, 304 U.S. 1, 18 (1938) (it is "not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required"); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

B. Guideline One provided that the unadjusted census figures would "be considered the most accurate count of the population of the United States, at the national, State, and local level, unless an adjusted count is shown to be more accurate." Pet. App. 151.[9] Respondents

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[9] The Secretary's final decision stated that "[a]n adjustment to the census is a fundamental change in the way we count and locate the persons residing in the United States." Pet. App. 150. Respondents point out (Br. 4-5) that statistical imputation techniques were used in the 1970 and 1980 censuses to estimate occupancy rates for housing units for which reliable information was unavailable. Respondents suggest (Br. 4) that the statistical adjustment proposed for the 1990 census is simply "another refinement" of an established practice. In fact, the proposed adjustment at issue here, which would have effected a change in the count for every occupied block in the country, is of a wholly different order of magnitude from the limited use of imputation techniques in prior censuses. When plaintiffs sought to compel a statistical adjustment to the 1980 census, the district court rejected a similar argument, concluding that "none of those adjustments in 1970 were even remotely similar to the types of wholesale adjustments

acknowledge (Br. 52) that the Secretary acted properly in giving precedence in his adjustment decision to distributive rather than numeric accuracy—that is, in focusing primarily on "getting the proportional distribution of the population right among geographical and political units" rather than on seeking the most accurate count of the total national population. Pet. App. 184; see U.S. Br. 14, 30-31. Respondents contend, however, that the Secretary employed an irrational approach in comparing the distributive accuracy of the adjusted and unadjusted figures. Specifically, respondents argue (Br. 55) that the Secretary (1) "focused on applications of the criterion of distributive accuracy that were unrelated to any use of census data," and (2) utilized an irrational methodology in comparing the distributive accuracy of the adjusted and unadjusted numbers at the state level.[10] Neither contention has merit.

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presently suggested by the plaintiffs." *Cuomo* v. *Baldrige*, 674 F. Supp. 1089, 1107 (S.D.N.Y. 1987).

[10] Respondents also state that the Secretary "regarded evidence of superior numeric accuracy as 'not relevant' to the determination of distributive accuracy" (Br. 39 (quoting Pet. App. 201)), a conclusion they characterize (Br. 52) as lying at the "determinative core" of the Secretary's decision. To begin with, respondents misconstrue the passage they quote, which states that "[w]hile the preponderance of the evidence leads me to believe that the total population at the national level falls between the census counts and the adjusted figures, that conclusion is not relevant to the determination of distributive accuracy." Pet. App. 201; see also *id.* at 147. The Secretary's statement that the unadjusted figures are too low and the adjusted figures too high obviously is not equivalent to a statement that adjustment would improve numeric accuracy. Indeed, the quoted passage was so non-determinative, and so peripheral, that respondents did not even mention it in their briefs in the court of appeals.

Although the passage quoted by respondents is not on point, it is doubtless true that the Secretary saw a real and substantial possibility

1. There is no basis for respondents' contention (Br. 55) that "the Secretary never considered analyses bearing on the superior accuracy of the adjusted counts for apportionment and districting." The Secretary emphasized that his focus on distributive rather than numeric accuracy was grounded in the constitutional purpose of the census, which is to apportion Representatives among the States, and in the other uses of the census,

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that a statistical adjustment could increase numeric accuracy while impairing distributive accuracy. Respondents suggest (Br. 39) that this conclusion was itself irrational, noting that "the Bureau has chosen to introduce innovations to maximize numeric accuracy because it has always recognized that improving numeric accuracy is the clearest way to improve distributive accuracy." Insofar as improved *enumeration* techniques are concerned, the two usually will go hand in hand. The enumeration process itself involves the identification of actual people and the places where they live: improvements in that process are therefore likely to provide a more accurate picture of the distribution of the population. There is, as the Secretary found, no similar basis for confidence that the statistical adjustment at issue here, which alters the population figures for every occupied block in the country based on a sample comprising less than 2% of the total population, will likewise improve distributive accuracy.

In our opening brief we state that "[e]ven a dramatic undercounting of the total population would not be inconsistent with the goal of fair apportionment if each State's share was accurately determined." U.S. Br. 30-31. Respondents dispute that proposition, offering a lengthy historical discursion that concludes (rather anticlimactically) with the observation (Br. 54 n.23) that "[o]nly under a method of apportionment such as the method of equal proportions (Hill method) is it true (and then only for congressional districts much larger than 30,000) that an evenly distributed undercount will not change the apportionment of Representatives." The method of equal proportions has been used for every apportionment from 1930 to the present, see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-452 (1992), and the average congressional district contains 572,466 persons, *id.* at 445. The government stands by the statement in its opening brief.

including intrastate redistricting and the distribution of federal funds. Pet. App. 141, 161, 184-185, 200-201. His ultimate conclusion was that "for the Constitutional purposes of the census the available evidence is consistent with the census counts being more accurate than the adjusted counts." *Id.* at 201. In theory, Guideline One might have led the Secretary to reject a proposed adjustment that was conceded to increase distributive accuracy at the state level if the Secretary had concluded that the unadjusted figures were superior at the local level. It is clear, however, that the Secretary's application of Guideline One did not in fact lead to that result. Rather, the Secretary stated that in his view "the census counts are the most accurate count of the population of the United States at the State and local levels." *Ibid.*[11]

2. In explaining that the superior distributive accuracy of the adjusted figures had not been demonstrated, the Secretary stated that, when realistic estimates of the relevant variances were used, the available evidence indicated that "the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy." Pet. App. 191; see page 9, *supra*.

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[11] Respondents chide the Secretary (Br. 40) for "cit[ing] the results of a Bureau loss function analysis of distributive accuracy for the 23 cities in metropolitan areas of 500,000 or more." To suggest that this passing reference was the "focus" of the Secretary's decision-making process (see *ibid.*) misreads the decision. In any event, although the question whether the adjusted or unadjusted numbers more accurately estimate Chicago's population vis-a-vis that of Los Angeles (see *ibid.*) is not dispositive of any representation or funding decision, it is surely *relevant* to assessing the reliability of the adjustment mechanism. For example, both the Undercount Steering Committee and Census Bureau Director Bryant attached some significance to their view that adjustment would generally improve proportional accuracy for places with a population of over 100,000. See DX 1, at 903; J.A. 81.

In respondents' view (Br. 41), the Secretary thereby "disregarded the sizes of errors," permitting "large gains in accuracy (with significant practical consequences) [to] be offset by small losses in accuracy (with little or no practical significance)." Contrary to that contention, however, determining the most appropriate measure of accuracy in these complex circumstances, and the best manner in which to weigh the respective (and competing) equities of the several States, requires exercise of precisely the sort of judgment that is entrusted to Congress and the Secretary under the pertinent constitutional and statutory provisions. It was, at the very least, "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777 (1992), for the Secretary to attach significance to the prospect that the relative shares of a majority of States would actually be made less accurate by an adjustment. As respondents point out (Br. 42), Dr. Freedman testified at trial that, although the counting of States in that manner "does give you some information," he did not think it "is such a good way" to measure distributive accuracy. See Tr. 2445.[12] But both the Undercount Steering Committee

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[12] Contrary to respondents' contention (see Br. 42, 54, 67), the government did not "conced[e]" in the court of appeals that the Secretary's reliance on the number of States whose proportional shares would be worsened was not "valid." In its brief below, the government simply noted (at 47 n.16) the testimony of Dr. Freedman that we quote here, while also noting that the technique was used by the Undercount Steering Committee, Census Bureau Director Bryant, and the Secretary. Similarly without merit is respondents' contention (see Br. 42, 55) that the Secretary's methodology was denounced by the Secretary's own expert witness (Dr. Freedman) as "borderline unreasonable." At trial, Dr. Freedman was presented with a hypothetical situation in which the actual population of each of five States was known, and in which the proportional shares of two of the States would

and the Census Bureau Director based their recommendations in favor of adjustment in substantial measure on their belief that adjustment would render more accurate the proportional shares of a majority of States. See DX 1, at 903, 913; J.A. 81. The Secretary can hardly be faulted for attaching significance to the same comparison.

C. Contrary to respondents' contention (Br. 57-58), the justifications for deference to an agency's technical and policy determinations—the superior expertise and resources of agency officials, and respect for the decision of Congress to assign a particular matter to an administrative body—are fully applicable to the adjudication of constitutional questions.[13] There is no general rule that

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be made substantially more accurate by adjustment, while the shares of the other three would be made marginally less accurate. Tr. 2507. In response to a question whether a decision against adjustment in that situation would be "borderline unreasonable" (albeit without stating on "which side of the border" the decision would fall), Dr. Freedman answered: "That's fair." *Ibid.* Dr. Freedman did not regard the hypothetical example as functionally equivalent to the decision actually faced by the Secretary; to the contrary, he characterized the hypothetical as "unrealistic" in significant respects. Tr. 2507, 2540. Dr. Freedman never characterized the Secretary's approach to the problem actually at hand as "borderline unreasonable." Although he acknowledged that the Secretary had "made some mistakes, as anyone would," Tr. 2356, he agreed that the Secretary had considered the relevant questions "in a rational way," *ibid.*; see also Tr. 2380, and he agreed with the Secretary's ultimate conclusion that "[t]here is certainly not sufficient evidence to reject the distributive accuracy of the census counts in favor of the adjusted counts," Tr. 2358.

[13] Respondents seek (Br. 57) to distinguish this Court's prior decisions requiring judicial deference to an agency's technical decisions, on the ground that those cases were brought under statutes authorizing only limited judicial review. However, the Census Act's authorization to the Secretary to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. 141(a), is a broad and open-ended delegation that, as a general rule, would foreclose judicial

federal courts must resolve de novo all issues bearing on the ultimate disposition of a constitutional claim. To the contrary, federal courts adjudicating constitutional issues frequently defer (or accord a presumption of correctness) to subsidiary determinations made by actors better positioned to resolve particular questions. *E.g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994) (opinion of Kennedy, J.); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-50 (1938) (NLRB's factual findings concerning jurisdiction over employer under Commerce Clause reviewable to determine whether supported by "adequate evidence"); cf. *FPC* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575, 586 (1942) ("The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas.").[14] Moreover, appellate courts, including this Court, regularly defer to the factual findings of federal district courts even where those findings are determinative of a constitutional claim. See, *e.g.*, *Maine* v. *Taylor*, 477 U.S. 131, 144-145 (1986).

In this case, judicial deference is required by the text of the Constitution. The provision centrally relevant to this case states that the "actual Enumeration" shall be made "in such Manner as [Congress] shall by Law

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review altogether. See 5 U.S.C. 701(a)(2) (judicial review barred where matter "is committed to agency discretion by law"); see U.S. Br. at 18-27, *Franklin* v. *Massachusetts* (No. 91-1502).

[14] See also *Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979) (although Constitution requires that criminal conviction be based on proof beyond a reasonable doubt, question for reviewing court is not whether court believes that proof was sufficient, but whether any reasonable jury could conclude that applicable evidentiary standard was met); *Thompson* v. *Keohane*, 116 S. Ct. 457, 463-465 (1995) (federal court adjudicating habeas corpus application must accord presumption of correctness to state court findings of fact).

direct." Art. I, § 2, Cl. 3. The fact that population figures are used to apportion Representatives among the States (and thus indirectly affect voting) does not permit a court to second-guess the "Manner" in which Congress (through the Secretary) has conducted the census.

D. As we explain in our opening brief (at 45), establishment of an equal protection violation based upon racial discrimination requires proof of a discriminatory purpose. *Washington* v. *Davis*, 426 U.S. 229, 239-245 (1976).[15] Contrary to respondents' suggestion (Br. 70), we do not contend that a showing of intentional racial discrimination is a necessary predicate of *every* equal protection claim. Without showing intentional racial discrimination, a plaintiff challenging a State's districting decisions may prevail by showing that differences between the populations of individual districts within the State are "not the product of a good-faith effort to achieve population equality" as nearly as practicable,

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[15] Respondents do not contend that Secretary Mosbacher's 1991 decision was tainted by intentional racial discrimination. But respondents do hint at a nefarious motive for the Commerce Department's initial 1987 decision against adjustment; they rely on a May 1987 intradepartmental memorandum that listed "adjustment problems" and predicted that "States with large minority populations would benefit from an adjustment and states with small minority populations would lose." Resp. Br. 21 (quoting PX 574, attached memorandum at 1). Read as a whole, however, the memorandum clearly did not suggest that the expected benefit to States with high minority populations was itself a "problem." The point instead was simply that an adjustment would have predictable winners and losers, and that "[n]o matter which party is in power, it is quite likely that there will be those who will charge the Bureau or the Department with fraudulent motives for adjusting the counts." PX 574, attached memorandum at 3. As matters developed, the correlation between a State's minority population and its gain or loss from adjustment was far less clear than the 1987 memorandum anticipated. See note 17, *infra*.

unless the State demonstrates that "the population deviations in its plan were necessary to achieve some legitimate state objective." *Karcher*, 462 U.S. at 740. The significant differences between apportionment of Representatives among the States and the process of intrastate districting counsel against mechanical application of the *Karcher* framework here. Even assuming that the *Karcher* analysis applies by analogy, however, the Secretary clearly made a good-faith effort to maximize equality of representation (*i.e.*, distributive accuracy) as nearly as practicable. See U.S. Br. 39-45.[16]

E. Respondents seek to prevail without showing *either* a discriminatory motive *or* unnecessary deviations between the size of districts in different States. They contend (Br. 71) that even if "the Secretary was genuinely in doubt about the comparative accuracy of the two counts or found the two counts equally erroneous, his choice of the count in which inaccuracy is systematically concentrated among minorities instead of the count in which inaccuracy is non-systematically distributed throughout the population would warrant strict scrutiny." Respondents' disparate impact claim is incon-

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[16] Under *Karcher*, the Secretary could be found not to have made a good-faith effort to maximize equality of representation only if (1) the Secretary had determined that the adjusted figures would increase distributive accuracy but had nevertheless declined to make an adjustment (see U.S. Br. 43), or (2) the Secretary's determination that the adjusted figures had not been shown to be more accurate was irrational (see *id.* at 45). For the reasons stated in text and in our opening brief, neither of those propositions is sustainable. Respondents attempt to establish the lack of a good-faith effort by impeaching the integrity of Secretary Mosbacher, contending (Br. 70) that the Secretary's actions evinced an unwillingness to give serious consideration to adjustment. The district court correctly and emphatically rejected a similar argument. See Pet. App. 62-63 n.16.

sistent with this Court's precedents and is unsupported by the record.

1. This Court has previously considered equal protection challenges to electoral devices, such as multimember districting and at-large voting systems, that do not create districts of unequal size but that are alleged to have an adverse effect on voters of a particular race. The Court has "required plaintiffs to demonstrate that the challenged practice has the *purpose* and effect of diluting a racial group's voting strength." *Shaw* v. *Reno*, 113 S. Ct. 2816, 2828 (1993) (emphasis added) (citing cases); see also, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 618-619 (1982). The requirement that plaintiffs demonstrate discriminatory intent "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause." *Id.* at 619 (quoting *Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion)). The legal standard announced in *Washington* v. *Davis* is thus applicable to controversies bearing on the right to vote.

2. In any event, respondents failed at trial to show that the decision against adjustment had an adverse effect upon the electoral power of minority voters. The constitutional purpose of the census is to apportion Representatives among the States, not to allocate representation or financial benefits among racial or other demographic groups. The decision against adjustment therefore harms minority residents only to the extent that States with disproportionately high minority populations would have been credited with higher shares of the country's population if the proposed adjustment had been made. As we note in our opening brief (Br. 48-49), however, respondents made no comprehensive effort at trial to demonstrate that this was so. Thus, even if a disparate impact upon minority residents furnished a basis for a

constitutional challenge, respondents have failed to offer the requisite proof.[17]

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded with directions to enter judgment for petitioners.

DREW S. DAYS, III
Solicitor General

DECEMBER 1995

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[17] Respondents state (Br. 26) that "undercounting was concentrated in areas where minorities are concentrated—in California, Texas, Florida and other states of the Southwest and South and in major cities across the country." California, Texas, and Florida do have high minority populations, see Bureau of the Census, Department of Commerce, *State and Metropolitan Area Data Book 1991*, at XIV-XV (4th ed. 1991) (*Data Book*), and all three States would have been credited with larger shares of the country's population if adjusted figures had been used. See A.R., App. 10, Table 5. On the other hand, States such as Illinois, New Jersey, and New York also have large minority populations, see *Data Book*, at XIV-XV, and all three would have lost population share if the proposed adjustment had been made. See A.R., App. 10, Table 5. Respondents assert (Br. 27) that higher than average undercounts also occurred in northeastern cities such as New York, Chicago, Detroit, Baltimore, and Washington, D.C. They fail to note, however, that the States in which four of those five cities are located—New York, Illinois, Michigan, and Maryland—would lose population share under the proposed adjustment. See A.R., App. 10, Table 5. Two experts have determined, in fact, that "[u]rban blacks have an undercount three times that of the rest of the population, according to the PES; but 55% of them live in states that would lose population share if the adjustment were implemented." D. Freedman & K. Wachter, *Rejoinder*, 9 Stat. Sci. 527, 537 (1994).

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CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF U.S. SENATORS HERB KOHL, ARLEN SPECTER AND RUSSELL FEINGOLD AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF U.S. SENATORS HERB KOHL, ARLEN SPECTER AND RUSSELL FEINGOLD AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Herb Kohl, Arlen Specter and Russell Feingold are United States Senators who, as citizens, legislators and members of the Senate Committee on the Judiciary, share a direct interest in the integrity of the census.[1] The decision, by a divided panel, of the court of appeals in *City of New York v. U.S. Department of Commerce*, 34 F.3d 1114 (2nd Cir. 1994), *cert. granted*, 64 U.S.L.W. 3238 (Sept. 27, 1995), questions not only that integrity but the countless decisions made, since 1991, by local, state and federal governments relying on the census for its accuracy and fairness.

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[1] Senator Kohl was, until 1993, the Chairman of the Subcommittee on Government Information and Regulation of the Senate's Committee on Governmental Affairs, which has oversight jurisdiction of the census.

A decision by this Court to affirm the court of appeals would lead, inexorably, to a reapportionment of the Congress and, directly, to the mid-decade loss by Wisconsin and Pennsylvania of seats in the U.S. House of Representatives and their corresponding votes in the electoral college. *Id.* at 1122. Moreover, the harsh consequences of the court of appeals' decision would reach every level of government and every citizen for they have properly relied, for the last four years, on the accuracy of the 1990 census to conduct the public's business and to ensure "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

The principal petitioner and the principal respondent have consented to the filing of this brief, and their letters of consent are on file with the Clerk of the Court pursuant to Rule 37. With the United States and the States of Wisconsin and Oklahoma (in Case Nos. 94-1614 and 94-1631, respectively, which have been consolidated with this case), amici request that this Court reverse the decision of the court of appeals, thereby affirming the district court's judgment and the 1991 decision by the Secretary of Commerce that declined to use statistical sampling to adjust the results of the census.

SUMMARY OF ARGUMENT

The Constitution, in Article I, section 2, mandates an "actual enumeration" of the country's population every 10 years. The census serves two related and equally compelling purposes: to count the population and to locate the people of this country by state and political subdivision. The results of the census determine the apportionment of the House of Representatives, the number of presidential electors for each state, the shape of state legislative districts, and boundaries for county and city elections. In addition, Congress and the executive branch rely on the decennial census to allocate federal funds to state and local governments. The census, in this federalist

system, provides nothing less than distributive fairness in a country of 250 million people.

The census is an enumeration, an individual count under the Constitution of the "whole number of persons in each state," not a statistical survey or poll. And it is imperfect. Long before the 1990 census, there was controversy over whether statistical sampling procedures should be used to adjust the results for the miscounting that occurs in every census. For at least 50 years, concern has grown about undercounting, particularly "differential undercounts" (higher undercount rates for certain racial and ethnic minority groups than for non-minorities). That has led to repeated proposals, repeatedly rejected by Congress and the courts, to alter or statistically "adjust" the decennial census data to "improve" their accuracy.

The precise number of people and their distribution within the United States can never be determined with absolute certainty. The size of the country, its heterogeneity, and the mobility of its population over a large area make that impossible. Some people are unwilling to be counted while others are unable to complete the census forms. Given the complexity and inherent imperfection of any census, the question for this Court is whether the administrative decision not to adjust the 1990 census was within the range of choices constitutionally available to the federal government through the Department and Secretary of Commerce. Indeed, the dispositive question is not whether there was an undercount, but whether it is possible to "remedy" an undercount without damaging the accuracy, the credibility and the distributive fairness of the census.

Any decision to adjust the census cannot be based solely on the possibility, or even the certainty, that the statistically-adjusted result might reflect more accurately the *total* population of the country or any particular state. Adjusted totals must, if they are to supplant the census, reflect as well a more accurate distribution of the relative

population among the states, counties, cities, wards, and precincts of the United States. The Secretary's decision in 1991 to leave the census intact rested on persuasive evidence that the proposed adjustments failed to improve—and, indeed, probably would undermine—the accuracy of the population distribution among the states. The court of appeals improperly applied strict scrutiny to the Secretary's decision, mistakenly equating a dispute over "equal representation" with a dispute between statisticians. Yet under *any* standard of review, strict or deferential, the Secretary's decision should be affirmed.

The proposed adjustment at issue here would sacrifice distributive accuracy—"fairness," the district court said, *City of New York v. U.S. Department of Commerce*, 822 F. Supp. 906, 924 (E.D.N.Y. 1993) (*City of New York III*)—on the altar of an unattainable statistical ideal for the country as a whole. The adjustment would "count" six million unidentified people yet "discount" more than 900,000 people actually counted and identified by the census. If the census were now adjusted, the record suggests the population of 29 states arguably would be more accurately reflected, but the population count in the remaining 21 states would become less accurate and, accordingly, less fair. Administrative decisions can turn on these statistical distinctions, but constitutional decisions should not.

PROCEDURAL BACKGROUND

Statistical adjustment, which has had its advocates since the 1950s, first became a major issue for the 1980 census. *See* JENNIFER D. WILLIAMS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, DECENNIAL CENSUS COVERAGE: THE ADJUSTMENT ISSUE 5 (1994) (the "CRS Report"). On May 13, 1980, the Secretary of Commerce directed the Census Bureau to decide whether to adjust the 1980 census results. Declining to do that, the Bureau maintained that its "coverage improvement programs had been successful and that there was no accurate method available to adjust the population data."

Id. at 6. The Bureau stressed the need for continuing research on undercount measurement. *See* U.S. Library of Congress, *Adjusting the 1990 Census*, p. 6.

Following the announcement, more than 50 lawsuits were filed, most asking the courts to order the census statistically adjusted. In one case, *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *decided sub nom., Cuomo v. Baldridge*, 674 F. Supp. 1089 (S.D.N.Y. 1987), the State of New York alleged that, because of the 1980 undercount of African-Americans and Hispanics, it lost a congressional seat and millions of dollars in federal funds. The court affirmed the Census Bureau's conclusion that adequate census adjustment methodology had not been developed. *Id.* at 1107; *see* U.S. Library of Congress, *Adjusting the 1990 Census*, p. 7.

For the 1990 census, the Census Bureau created an Undercount Steering Committee and staff to address the undercount issue. The Bureau also solicited opinions on adjustment from outside experts and organizations including the American Statistical Association and the National Academy of Sciences. *See City of New York III*, 822 F. Supp. at 913-14. On October 30, 1987, however, the Commerce Department announced that it did not intend to adjust the 1990 census for a number of reasons, including the inherent subjectivity and questionable reliability of the adjustment process.

Within a year, the plaintiffs sued to enjoin the 1990 census, challenging its methodology and seeking to reverse the administrative decision against adjustment. The Department of Commerce, its Secretary, the Census Bureau, President George Bush and other public officials, all defendants, moved to dismiss the case, but the U.S. District Court for the Eastern District of New York concluded that the plaintiffs had standing to challenge the census on constitutional grounds. *City of New York v. U.S. Department of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989) (*City of New York I*). The district

court also ruled that it would review the Secretary's decision not to adjust the 1990 census under the "arbitrary and capricious" standard of review established by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982) ("APA"). *See City of New York I*, 713 F. Supp. at 54.

The parties ultimately agreed that the Commerce Department would vacate its 1987 decision against the prospective census adjustment—provided that Robert A. Mosbacher, then Secretary of Commerce, would decide by July 15, 1991 "*de novo* and 'with an open mind' whether adjustment was warranted." *City of New York III*, 822 F. Supp. at 915. The stipulation acknowledged the Commerce Department's program to gather the statistical data necessary for an adjustment, and the Department established "guidelines" for the Secretary's decision. With the stipulation, the parties also created an eight-member Special Advisory Panel of statistical and demographic experts with the plaintiffs naming four of the experts.

The plaintiffs then challenged the Department's guidelines as vague and inadequate and sought a declaratory judgment that a statistical adjustment would not violate the Constitution or any federal statute. The defendants again responded that the plaintiffs' challenge presented a nonjusticiable political question. In *City of New York v. U.S. Department of Commerce*, 739 F. Supp. 761, 767-68 (E.D.N.Y. 1990) (*City of New York II*), the district court again rejected the political question defense and concluded that statistical adjustment *per se* would not violate the Constitution or federal law.

On July 15, 1991, with the case pending, Secretary Mosbacher announced that the 1990 census would not be adjusted. *See* 56 Fed. Reg. 33582 (the "Decision"). Appearing before the census subcommittee of the House of Representatives' Committee on the Post Office and Civil Service, Mosbacher testified that "[a]fter a thorough review, I find the evidence in support of an adjustment to

be inconclusive and unconvincing." *Oversight Hearing to Review Census Adjustment Decision: Hearing Before the Subcomm. on Census and Population of the House Comm. on the Post Office and Civil Service*, 102d Cong., 1st Sess. 13 (1991) (testimony of Robert A. Mosbacher).[2]

The district court tried the case for more than two weeks in 1992, hearing a wide variety of testimony and evidence. In an April 13, 1993 decision, Judge Joseph M. McLaughlin declined to overturn the Commerce Department's decision against adjustment and held that the Secretary's decision, construed in light of constitutional requirements, was not "so beyond the pale of reason as to be arbitrary or capricious." *City of New York III*, 822 F. Supp. at 929.

On July 6, 1993, the plaintiffs appealed the decision to the U.S. Court of Appeals for the Second Circuit. Vacating and remanding the district court's decision, the appellate court concluded last year that "given the concededly greater accuracy of the adjusted count, the Secretary's decision was not entitled to be upheld without a showing by the Secretary that the refusal to adjust the census was essential to the achievement of a legitimate governmental objective." *City of New York*, 34 F.3d at 1124. This Court granted the petitions for a writ of certiorari on September 27, 1995.

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[2] Following the Secretary's decision not to adjust the 1990 census, the States of Wisconsin and Oklahoma intervened as defendants in the New York district court case. Wisconsin had filed suit in the U.S. District Court for the Western District of Wisconsin to enjoin the proposed adjustment, but the state voluntarily dismissed the case following the Secretary's decision. *State of Wisconsin v. U.S. Department of Commerce*, No. 91-C-0542-C (W.D. Wis. 1991).

ARGUMENT

The court of appeals erred, fundamentally, when it characterized the Secretary's decision as conceding the "greater accuracy of the adjusted count." In fact, the Secretary's only concession was to acknowledge the obvious: the statistical adjustment might well improve the total count for some purposes and in some areas, but for many—if not most—purposes, the census itself provided the more accurate count. Ultimately, the Secretary concluded that the evidence in support of an adjustment was both inconclusive and unconvincing:

> In attempting to make the total count more accurate by an adjustment, the relative count among the states would become less accurate with about 21 states adversely affected.
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> Many large cities received less accurate treatment under an adjustment.
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> Fully one third of the population lives in areas where the *census* appears more accurate and, as population units become smaller, the adjusted figures become increasingly unreliable.
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> And, finally, when the Census Bureau made allowances for factors not yet estimated, the census enumeration in 28 or 29 states became less accurate "as adjusted."

Decision at 1-1 - 1-5. Any one of these factual conclusions, standing alone, would support the Secretary's conclusion and the district court's decision affirming it. Taken collectively, however, the facts more than meet even the Second Circuit's demanding (and erroneous) requirement that the decision not to adjust the census be "essential" to achieve a legitimate governmental objective. The Secretary's decision not to adjust the 1990 enumeration applies and protects the constitutional principles of fairness, accuracy and integrity that underlie the decennial census.

I. THE PROPOSED ADJUSTMENT WOULD NOT, IN FACT, MAKE THE CENSUS MORE ACCURATE.

An adjustment is not a recount. It is, at best, an estimate—albeit an educated one—about who was missed in the actual census. There is a general consensus among statisticians and demographers who oppose adjustment that the process of estimating the undercount is, itself, very uncertain. Assuming that minorities were disproportionately undercounted, in a census that actually counted more than 98 percent of the population, then they will likely be undercounted at even higher rates in a post-census survey that samples a much smaller segment of the population. That is particularly true where, as here, the post-census survey depends entirely on census employees canvassing residential areas rather than on individual household participation in the process.

There have been many attempts—in Congress and in the courts, before and after the 1990 census—to require the Census Bureau to adjust the census results to "correct" the undercount. The two other circuits that have addressed this issue agreed with the district court in this case.[3] No attempt had succeeded until the Second Circuit's decision, and with good reason. The director of the census may have put it best: "Adjustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." BARBARA EVERITT BRYANT, RECOMMENDATION TO SECRETARY OF COMMERCE ROBERT A. MOSBACHER ON WHETHER OR NOT TO ADJUST THE 1990 CENSUS 3 (1991) (the "Bryant Report"). That is precisely why the Secretary's administrative decision should stand and the census should remain intact.

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[3] *See City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1217 (1994); *Tucker v. U.S. Department of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 407 (1992).

A. The Enumeration Is Accurate.

The 1990 census counted 248,709,873 people in the "actual enumeration" required by the Constitution. In his report to the Secretary of Commerce, one member of the Special Advisory Committee summarized the critical difference between the census itself and the proposed adjustment:

> Adjustment numbers are no more than estimates, just as the Census numbers are estimates. The difference is that Census estimates are based on a physical count—at least some sort of reality—while adjusted numbers are not. Since the Census correctly enumerated 98.8% of the population—a percentage that is well within the margin of error for a survey of this size—there is no reason to use an adjustment that has a greater margin of error.

J. MICHAEL MCGEHEE, REPORT TO SECRETARY ROBERT A. MOSBACHER ON THE ISSUE OF ADJUSTING THE 1990 CENSUS 3 (1991) (the "McGehee Report").

The first step in the 1990 decennial census was an enumeration, an attempt actually to count every person residing in the United States on April 1, 1990 by mailing census questionnaires to addresses compiled by the Census Bureau. Residents were asked to complete the questionnaire and return it by mail. To independently evaluate and assess the quality and coverage of the census, the Census Bureau used two statistical measurements: the post-enumeration survey (the "PES") and a demographic analysis (the "DA").

The PES is a sample survey developed in the 1980s to provide additional geographic and ethnic information about the people missed in the census. The Census Bureau conducted a survey of approximately 165,000 housing units in 5,290 census blocks or small block clusters shortly after the 1990 census. Interviewers went to every household on the sample blocks to collect basic information.

These survey records were then matched against the census data for those blocks to determine who had been missed or erroneously included in the census. Following the matching process, the Census Bureau developed undercount factors for 1,392 groups based on census division, type of place of residence, tenure of residence, race, ethnicity, gender, and age. Decision at 2-13. Using an intricate combination of statistical models, the Bureau then drew inferences about the number of people missed by the census and their location. The Secretary's ultimate decision not to adjust the census was based, in part, on the uncertain quality of the PES and the inferences drawn from it.[4]

The second population measurement, demographic analysis, takes information from administrative records (previous censuses, birth and death certificates, and immigration and emigration forms) to develop an independent estimate of the population at *a national level.* Historically, both this type of post-census research and surveys like the PES had been used only for evaluation purposes and to plan the next census rather than, as proposed here, for adjusting the most recent one. *See* Bryant Report at 5.

The official 1990 census of the resident population (the civilian plus U.S. Armed Services population living in the United States) counted 248.7 million people. The Census

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[4] The PES methodology attempts to count people twice, in selected areas, and then compares the results from one count and set of records (the census) with the results from the other count and set of records (the PES compiled by interviewers):

> As a result, not only do the enumeration errors affect the quality of both sets of numbers, but the problems associated with matching records between the PES and the Census must also be taken into account; e.g. Do women match better than men?; Do matchers in Kansas City do a better job than those in Albany?; . . . Are there more people to match in Albany than in Kansas City?

McGehee Report at 10.

Bureau's estimates from its demographic analysis indicated a net undercount of about 4.7 million people, almost 1.9 percent of the total population. The Bureau's estimates from the PES initially suggested a net undercount of 5.3 million or 2.1 percent of the 1990 total population. Subsequent research and the discovery of a computer error, however, revised the PES undercount to just 1.6 percent of the population. *See* CRS Report at 11-12.

There is an obvious difficulty in using PES or DA-based data to "correct" any undercount in the 1990 census—the corrections suggested by each method are substantially different and, indeed, contradictory. A PES adjustment to the census would move many subpopulation totals in precisely the opposite direction of an adjustment based on demographic analysis:

- An adjustment based on the PES will add 180,318 non-black males age 19 while the DA suggests that 136,908 be deleted from the count.
- A PES adjustment will delete 91,631 males over the age of 65 while DA would add 192,950.
- An adjustment based on the PES will add 375,053 females age 10-19 while DA indicates that 7,141 should be deleted.
- While DA indicates that 146,255 females over the age of 45 should be added, the PES would delete 245,253 of them.
- An adjustment based on the PES would add 1,055,826 more females than would DA. If the demographic analysis were correct, and the enumeration adjusted, the official population would have a .82 percent overcount of females imbedded in it.

See Decision at 2-10, 2-12.

In his decision, the Secretary found another comparison disturbing: every group of black males (except those age

10-19) was substantially undercounted by the PES when compared with DA. Accordingly, the PES-based undercount rates are substantially smaller. An adjustment based solely on PES would add 804,233 black males to the population while, under demographic analysis, the number of black males that theoretically should be added to the population is 1.33 million. For black females, the PES adjustment would add 29,390 fewer people. Even assuming for purposes of argument that DA estimates are more precise, however, DA could not be used to add the people missed by the PES to the census count because there is no way to determine where—in what state or county or city—to locate them. *See id.*

Ultimately, Secretary Mosbacher decided that neither accuracy nor fairness—both vital to the credibility and effectiveness of the decennial census—would be enhanced by the application of either a PES- or DA-based adjustment:

> [I]ncreased accuracy for census counts means not only increased accuracy in the *level* of the population, but also increased accuracy of the *distribution* of the population in states and localities. In particular, for the primary uses of the census—apportionment and redistricting—the share or fraction of the total population in a given state, city or precinct is critical. It is this fraction that determines political representation and the amount of Federal funds allocated across political jurisdictions. The paradox is that even if you improve the accuracy in the *level* of the population in any given city by adding at least some of the people missed in the census, you do not necessarily improve and can worsen accuracy in the *share* of the population in that city.

Id. at 2-11 (emphasis in the original).

Although the 1990 census may have undercounted several million Americans, no one can say with any confidence where those people are. The PES did *not* sample individual states or counties or cities. Without that infor-

mation, statistical surveys provide little reliable information to adjust the census fairly to reduce the impact of under-enumeration, or other sampling errors, at the national, state or local level.

After his July 15, 1991 decision, the Secretary testified at several congressional hearings that there simply was insufficient statistical precision in the adjusted counts to warrant their use instead of the original enumeration. That was at the heart of his decision. There was expert consensus, the Secretary said, that the adjusted numbers were less accurate on the block level. Even at the state level, moreover, there was uncertainty about which was more accurate, the original census or the adjusted counts. Referring to the people missed by the census, Secretary Mosbacher noted that the "implicit assumption" in adjusting the count is that "they are spread over the country in the same way as the post-adjustment population." Yet, he said, that "assumption has no empirical foundation." *Id.*

The Census Bureau analysts essentially concentrated on whether there was sufficient information to reduce the error in the numeric counts—without regard to whether that increased or decreased the severity of differential undercounts across geographical areas. "That is," the Secretary said, "they interpreted accuracy as concerned with getting the number of people closer to the truth rather than getting the allocation of the population for the purposes of political representation and funding closer to the truth." *Id.* at 2-24. The adjusted counts were less accurate than the enumeration, the Secretary concluded, and distributive accuracy would actually be impaired if the census were adjusted:

> [T]he Constitutional and legal purposes for the census must take precedence, and accuracy should be defined in terms of getting the proportional distribution of the population right among geographical and political units. This argues for putting aside the judgment of accuracy based on getting absolute num-

> bers right (numeric accuracy) and instead focusing on the question of whether there is convincing evidence that the accuracy of the population distribution in the adjusted numbers (distributive accuracy) is superior to the distributive accuracy of the actual enumeration.

Decision at 2-25. Senator Kohl reiterated precisely that point in his statement to the Senate Committee on Governmental Affairs on November 13, 1991: "[T]he most important question is this, can we prove that adjusted Census numbers are more accurate than the original numbers? Unless that question can be answered with an unequivocal yes[,] it would be *irresponsible and unfair* to adjust the numbers." (Emphasis added.) *Dividing The Dollars: Issues in Adjusting Decennial Counts and Intercensal Estimates for Funds Distribution, Hearing Before the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs,* 102d Cong., 2d Sess. 20 (1992) (statement of Sen. Kohl).

At a minimum, the first guideline adopted by the Department of Commerce for the census establishes a rebuttable presumption that the unadjusted census figures provide the most accurate count. The burden of proof falls on the proponents of "adjustment" to demonstrate otherwise.

> The Census shall be considered the most accurate count of the population of the United States, at the national, State and local level, unless an adjusted count is shown to be more accurate.

Decision at 2-5. The mandate of this guideline is unambiguous. In the absence of evidence establishing that adjusted estimates are more accurate than the census—at the national, state and local level both in relative and in absolute terms—the census counts are presumed more accurate. The Secretary of Commerce found that evidence wanting or unavailable in 1991, and it remains so today.

In affirming Secretary Mosbacher's decision not to adjust the 1990 Census, Judge McLaughlin emphasized the importance of distributive fairness:

> The Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits. . . . [T]he Secretary's concern that "with respect to places under 100,000 population, there is no direct evidence that adjusted counts are more accurate" was legitimate, given Guideline One's requirement that the adjusted counts be shown to be more accurate at the local level. Decision at 2-30.

City of New York III, 822 F. Supp. at 924. The census is not an academic exercise, in other words, but a constitutional responsibility of the federal government that literally shapes the political and social structure of this country. Census decisions are reviewable in that context, whether under the APA or a more demanding standard, not as part of the search for statistical perfection.

B. Adjustment Produces More, Not Less, Uncertainty.

The procedures proposed to adjust the census are novel, experimental at best. *See* Decision at 1-7. "Such research deserves and requires careful professional scrutiny," Secretary Mosbacher concluded, "before it is used to affect the allocation of political representation." *Id.* State demographic officials responding to a 1991 poll on the adjustment issue overwhelmingly opposed adjustment. A smaller group of statisticians and demographers were evenly split on adjustment—for, against, and undecided—with one expert quoted as describing adjustment, candidly, as "a statistician's sandbox." *Adjustment Again? The Accuracy of the Census Bureau's Population Estimates and the Impact on State Funding*

Allocations, Hearing Before the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. 3 (1992) (statement of Sen. Glenn).

Following the decision not to adjust the 1990 census, the Senate's Governmental Affairs Committee concluded that:

> There is no new information to suggest that adjusting the census is any more accurate or feasible now than it was last July [1991]. Since then we have discovered that the adjusted numbers published at that time were incorrect. Thus we conclude that accurately adjusting the census to correct for the undercount is not possible.
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> In sum, the post-enumeration survey should be viewed as a major experiment in understanding the characteristics and geographic distribution of persons missed in the census. That experiment should be evaluated in an effort to reduce the undercount in the 2000 census. . . . [T]he time available in 1990 was insufficient to both develop the adjustment model and carry out the complicated procedures required by that model. Rather than lock onto a model that is inherently flawed, the PES can be used to develop models for future use that are more robust and less sensitive to minor changes in assumptions.

Dividing The Dollars: Issues in Adjusting Decennial Counts and Intercensal Estimates for Funds Distribution, Report Prepared by the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. 3 (1992). J. Michael McGehee, a member of the Advisory Panel, explained in his report that the problem with statistical census adjustments was that the verification of results had proven that "adjustment formulas were highly inaccurate. Twenty-six Census Bureau studies of the Post Enumeration Survey . . . and Demographic Analysis . . .

which form the Dual System Estimate (DSE) methodology[,] have shown that they are no more accurate than current Census practices." *See* McGehee Report at 2.

In concluding that the 1990 census should not be adjusted, the Secretary considered the shortcomings generally inherent in statistical formulations—that any statistical formula attempting to establish precise populations would be based on assumptions, assumptions that are subjectively chosen and weighed, assumptions that might be wrong. In addition, the Secretary considered the fact that adjusted numbers are no more than estimates and—unlike the enumeration, which is based on an actual count—entirely the product of statistical inferences with no correspondingly direct basis in reality.

Since statistical assumptions are the foundation upon which confidence in the "final" adjustment rests "[a] politically 'better' count cannot be defended if it is shown that the assumptions on which it rests are changeable." *Id.* at 6. Even small changes in statistical models result in different population estimates. Consider the results of two adjustment processes released by the Census Bureau on June 13, 1991. Although the technical differences between them were minor, the differences in results were substantial and, in terms of apportionment and equal representation, extraordinary.

Under one plan, two seats in the House of Representatives moved while under the other method only one seat moved. *See* Decision at 1-5. Similarly, one expert found that among five reasonable alternative methods of adjustment, none of the resulting apportionments of the House of Representatives were the same, and 11 different states either lost or gained a seat in at least one of the five models. *Id.* at 1-5 - 1-6. In view of these facts, Secretary Mosbacher found it unsettling that a subjective choice of statistical methodology can create such a dramatic practical difference in apportionment. *Id.* at 1-6.

The only acceptable rationale for a decision to adjust the census would be to correct a demonstrable inequity. No inequity can be corrected, however, unless the statistical quality of the numbers can be assured. That is not possible with respect to the 1990 adjustment because those numbers rely on statistical methods that are untested, unstable and unverifiable. Dr. Michael R. Darby, then Under Secretary of Economic and Statistical Affairs and one of the Advisory Panel members, summarized the decision not to adjust in familiar terms:

> [M]y conclusion was that it certainly was not proven that the adjustment would improve the accuracy, and it may well worsen the accuracy and treat people less fairly.
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> . . . .
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> If we miss four million people and we don't know where they live, putting them into some other block than where they live doesn't really help them or help fairness. Some people get too much and other people still get too little, and it can make things worse.

Review and Evaluation of Secretary Mosbacher's Decision on the 1990 Census Adjustment, Hearing Before the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs, 102d Cong., 1st Sess. 9-10 (1991) (statement of Dr. Darby).

II. ADJUSTMENT WOULD DISCOURAGE CITIZEN PARTICIPATION IN THE CENSUS AND ENCOURAGE THE POLITICIZATION OF THE CENSUS.

The success of the 1990 census, based on a mail out/mail back format, depended on the widespread and voluntary participation of the people. *See Baldridge v. Shapiro,* 455 U.S. 345, 354 (1982). The most accurate method for locating and counting the people of the United States is to ask each household to submit information about the number of people living there. When people fail to submit the requested information, the Census Bu-

reau must send enumerators (field workers) to canvass neighborhoods house-to-house to learn how many people live in each one. Data collected by enumerators can never be as accurate as data submitted voluntarily. *See* U.S. GENERAL ACCOUNTING OFFICE, DECENNIAL CENSUS: 1990 RESULTS SHOW NEED FOR FUNDAMENTAL REFORM 3 (1992) (the "GAO Report"). As voluntary participation in the census declines, there is necessarily greater dependence on data collected by enumerators. The more data enumerators have to collect, however, the more likely they are to miss and miscount people, and the more inaccurate the census becomes.[5] *Id.* at 47. Accordingly, the GAO concluded, "[a] high level of public cooperation is the key to obtaining accurate data at a reasonable cost." *Id.* at 35.

A Any Statistical Adjustment Would Lead To Declining Participation In The Census.

The Secretary decided not to adjust the 1990 census based, in part, on his concern about the effect an adjustment would have on future census participation:

> [A]n adjustment would remove the incentive of states and localities to join in the effort to get a full and complete count. The Census Bureau relies heavily on the active support of state and local leaders to encourage census participation in their communities. Because census counts are the basis for political representation and federal funding allocations, communities have a vital interest in achieving the highest possible participation rates. If civic leaders and local

[5] Low participation leads to increased costs as well as errors. Voluntary participation by mail in the 1990 census was lower than in previous censuses and, as a result, the Census Bureau had to hire over 300,000 enumerators. *See* GAO Report at 45. That follow-up is expensive: in constant dollars, the Census Bureau spent 65 percent more on the 1990 census than on the 1980 census. *Id.* at 4. The increasing costs of the census are due, at least in part, to declining participation. *Id.* at 24.

> officials believe that an adjustment will rectify failures in the census, they will be hard pressed to justify putting census outreach programs above the many other needs clamoring for their limited resources.

Decision at 1-6 - 1-7.

> Currently, it is in the interests of every governor, mayor, and interest group to help get their target populations counted. . . . The[ir] efforts include mapping, address compilation, massive advertising campaigns, and public awareness activities . . . [that] are absolutely critical to the Census Bureau's mission to conduct an actual enumeration. . . . [A]n adjustment would remove the incentive that these public officials and groups currently have to provide active support in achieving a complete count.

Id. at 2-59. "Without the partnership of states and cities in creating public awareness and a sense of involvement in the census," the Secretary concluded, "the result is likely to be a further decline in participation." *Id.* at 1-7.

The 1990 census provides a stark example of how adjustment would penalize a high rate of census participation. Prior to the census, Wisconsin undertook a statewide public awareness campaign and targeted outreach program that resulted in the highest census participation of any state. The state's efforts included a matching grant program aimed at traditionally undercounted groups. *See* Nancy Hurley, *Winding Up Wisconsin's Census Efforts*, WISCONSIN COUNTIES, Dec. 1990, p. 36 ("Hurley"). To qualify for grants, municipalities submitted proposals targeting "hard-to-enumerate" groups including racial and ethnic minorities, people with limited English-speaking ability, the homeless, migrant workers, homebound individuals, students and people living in public housing or other concentrations of rental units. *See Wisconsin's Census Awareness Campaign*, THE 1990 CENSUS, A WISCONSIN HANDBOOK, p. 17.

As a result, Wisconsin had the highest voluntary census mail response rate in the country: 75 percent of the Wisconsin households that received a census questionnaire in the mail completed and returned the form, compared with about 64 percent nationwide. *See* Hurley at 36. Yet despite that accomplishment, formally recognized by the Census Bureau, the state stands to lose a seat in the House of Representatives and a portion of its share of federal funds if the census is adjusted. *City of New York*, 34 F.3d at 1122. The state would suffer that loss precisely *because* of its relatively low estimated undercount compared with other states. Faced with this example, how many state and local officials will choose to allocate their declining resources to programs designed to encourage participation in the next census?

The Census Bureau can estimate how many people were missed or erroneously included in the census, but it has no way of knowing where those people actually live. Accordingly, local officials in many census subdivisions will have even less reason to encourage citizen participation because it would reduce the high error rates that the adjustment process otherwise would "assume" affected their counts. Those error rates would lead to a higher estimated population under an adjusted census and, thus, a greater share of political representation and federal funds.

The statistical adjustment rejected by the Secretary uses sampling methods to assign people, assumed erroneously included or omitted from the census, to specific geographic areas. That process is based on the known error rate in counting similar people in similar communities within the same census division, though not necessarily the same state. Thus, an area with particularly high error rates will drive up the error rates imputed to all of the communities within the same census division. Since the census results for those communities would then be adjusted to show additional people, com-

munity leaders would be foolish to risk greater political representation and federal funding by encouraging the very participation that will reduce the error rates.

Adjustment also threatens public confidence in the census, adversely affecting citizen participation. The public no doubt will question why the government spent $2.6 billion to conduct a head count that produced results inaccurate enough to require "adjustment" by a statistical formula. Adjustment necessarily implies that the census itself is significantly flawed, that the federal government has unwisely spent tax dollars, and that there is no need to be counted voluntarily because statisticians eventually will "count" everyone even if they choose not to participate in the census. Ultimately, the reduced accuracy and diminished integrity of the census will erode public confidence in government, lead to lower citizen participation and, in turn, to a further decline in census accuracy and to doubling the cost of the next decennial census.[6]

B. Statistical Adjustment Would Permit Political Manipulation.

Another concern raised by the Secretary was the possibility of political manipulation. Any adjustment methodology selected by the Census Bureau involves a number of subjective assumptions. As the assumptions vary, the results vary:

> [T]he choice of the adjustment method selected by Bureau officials can make a difference in apportionment, and the political outcome of that choice can be known in advance. I am confident that political considerations played no role in the Census Bu-

[6] If the trend in public cooperation continues, the national mail response rate could be as low as 55 percent in the year 2000. This would generate a corresponding increase in the Census Bureau's workload of nearly 50 million cases. Under this scenario, the Bureau's planning staff has estimated, the 2000 census could cost $4.8 billion in current dollars. *See* GAO Report at 41.

> reau's choice of an adjustment model for the 1990 census. I am deeply concerned, however, that adjustment would open the door to political tampering with the census in the future.

Decision at 1-6. Depending on the assumptions in a particular statistical model, the resulting adjustment will literally move Congressional seats from one state to another:

> Adjustment of census numbers, as it is devised at this point, is unfortunately subject to not only the charge but the actual fact of political manipulation. . . . The present adjustment process is subject to many "inside" assumptions and innumerable decisions by individuals about where to draw the sample, how to determine the various strata, what mathematical formulae to use, to name only a few of the important decisions. *It is certainly not hard to imagine that such a process, especially when cloaked in the mysteries of statistical complexity, could easily be corrupted and manipulated, particularly if it should become accepted practice and not subject to rigorous public examination, as is the case for the present decision.* (Emphasis in original.)

V. LANCE TARRANCE, JR., REPORT TO THE SECRETARY OF COMMERCE 29 (1991).

No individual can affect the outcome of the census enumeration, nor could the federal government directly manipulate adjusted census counts for political gain. "By contrast, a statistical adjustment of the census involves discretion in the selection of methods that can produce a wide variety of results. This permits government officials to know the political outcome of the chosen method in advance." MICHAEL R. DARBY, RECOMMENDATION TO THE SECRETARY ON THE ISSUE OF WHETHER OR NOT TO ADJUST THE 1990 DECENNIAL CENSUS, E-1 (1991). The concerns expressed by these and other experts justify the Secretary's decision. Rather than embark on a path

of unknown political possibilities with adjustment, he determined that the federal government's efforts and resources would be better spent developing a census-taking procedure that would reduce the problem of differential undercounts.

III. THE RELIEF GRANTED IN THIS CASE, IF ANY, SHOULD BE PROSPECTIVE.

This Court should reverse the court of appeals and remand the case to be dismissed with prejudice. If this Court nevertheless affirms the court of appeals' decision, any relief granted here or, on remand, by the district court, should be prospective. Indeed, any relief granted should be effective with the year 2000 census.

A retrospective adjustment of the 1990 census would disrupt program allocations and program planning for many states—at both the state and local level. State, county and municipal agencies use decennial census data for the planning and management of health and human service programs as well as for other "need" and "population" based programs. Political districting and political representation at the state and local levels have already been put in place based on the 1990 census data.

Many states, including Wisconsin and Pennsylvania, have allocated funds based on the 1990 census data. To change the base of the census numbers in mid-decade would significantly disrupt the delivery of social services, particularly in those states that would lose a substantial amount of federal funds. Litigation soon would follow, no doubt, to recover funds "overpaid" since 1991. Using the General Accounting Office's estimates of fiscal impact, for instance, Pennsylvania would lose $40 million and Wisconsin $15 million in federal funds annually if the census were adjusted. Shifting millions of dollars in federal aid from states that have relied on the 1990 census figures, when the Census Bureau itself concedes that sta-

tistical adjustment would not accurately reflect populations at subnational levels, would be imprudent and harsh.

The political impact would, if anything, be even more draconian. Testifying against adjustment before a Senate subcommittee, Wisconsin's Attorney General explained that the proposed "adjustment would unduly disrupt and delay the established political process":

> An adjusted census would require my State and other States to scrap that [local and state redistricting] process and start over with different population data. Such a change would result in confusion and delay for Congressional, State, county, city, town and village redistricting across the country. Indeed, we would run the risk of not completing our reapportionment work on time for the next election.

The Case Against Adjustment: The 1990 Census, Hearing Before the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs, 102d Cong., 1st Sess. 4 (1991) (statement of James Doyle, Attorney General, Wisconsin). And that was four years ago.

The reapportionment, by every state legislature, of their own legislative districts and every state's Congressional districts inevitably spawned an avalanche of federal court cases that only now are reaching this Court. *See, e.g., Miller v. Johnson,* —— U.S. ——, 115 S. Ct. —— (1995). Those disputes, whatever the issues and whatever the outcome, have assumed the constitutional accuracy of the 1990 census. To permit the district court even to consider, on remand, the possibility of retrospective relief would create a political and judicial nightmare.

The Census Bureau conceived the PES to help it do a better job of counting the people of America. The Bureau already has incorporated the results of the PES and its other post-census surveys into the planning for the year 2000 census. In fact, the next census may be

remarkably different than the 1990 census in concept and in methodology. Any relief granted the respondents in this case similarly should be directed to making the next census better and not to revisiting the last census—with all of the problems that would entail.

CONCLUSION

The apportionment of seats for the House of Representatives is done by "equal proportions," and redistricting within the states and the allocation of federal funds all rest on distributing the population into areas that are approximately equal. Accuracy for the decennial census requires the most accurate *proportional* distribution of the population across the country. Placing greater importance on distributive rather than numeric accuracy, the Secretary of Commerce correctly concluded that the "adjusted" data became less reliable below the national level, and the census numbers became more reliable. Accordingly, for the constitutionally mandated purposes of the census, the adjusted numbers are not only less accurate but less fair than the actual census count.

For these reasons, this Court should reverse the decision of the court of appeals.

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No. 94-1614, 94-1631, 94-1985

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

WISCONSIN, Petitioner

v.

CITY OF NEW YORK, et al., Respondents

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BEST AVAILABLE COPY

STATE OF OKLAHOMA, Petitioner

v.

CITY OF NEW YORK, et al., Respondents

UNITED STATES DEPARTMENT OF COMMERCE, et al., Petitioners

v.

CITY OF NEW YORK, et al., Respondents

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INTEREST OF THE AMICUS CURIAE

The respondents seek to compel an "adjustment" to the census results which, if translated into a mid-decade reapportionment of Congress, would cost Pennsylvania one seat in the House of Representatives and in the Electoral College, Pet. App. 87. Pennsylvania would, in that case, have to re-draw its congressional districts. In addition, because Pennsylvania bases its own state legislative districts upon the "official reporting of the Federal decennial census," Pa. Const., Art. 2, §17, an adjustment to the census results might also require a mid-decade redistricting of the Pennsylvania General Assembly. Finally, Pennsylvania believes that the decision of the Court of Appeals, if allowed to stand, will turn every census into an occasion for endless litigation, prolonged political turmoil, and ultimately, loss of public confidence in the representative branches of government--results which Pennsylvania, along with the rest of the States, has an interest in avoiding.

SUMMARY OF ARGUMENT

The Court of Appeals erred by importing into this case the standard of heightened scrutiny adopted in cases such as *Wesberry v. Sanders*, 376 U.S. 1 (1964), involving state redistricting. Instead, the Court should continue the course set in *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992) and *Department of Commerce v. Montana*, 503 U.S. 442 (1992), in which the Court deferred to the decisions of the responsible federal officials unless those decisions were inconsistent with the language of the Constitution. Under this standard, the Secretary's decision not to "adjust" the census count should not be disturbed.

1. It is extremely doubtful that the type of "adjustment" contemplated in this case is even permitted by the Constitution. The Constitution requires that the census be an "actual Enumeration" of the persons "in each State," but the adjustment contemplated here is neither. It is a statistical manipulation of the actual census count, in which some people who were actually counted are dropped while other people are counted twice; and in which the totals for each State are based on people who live in other States.

2. In any event, the Constitution does not require this adjustment, which would be a fundamental change from the practice of the last 200 years. There is no clear evidence that this adjustment would improve the accuracy of the census in the only constitutionally relevant sense: improving the fairness of the apportionment of the House of Representatives among the States. On the other hand, this adjustment would expose the census to the perception--and the reality--of partisan manipulation to achieve a preferred result, and might well undermine support for the census itself.

3. The standard used by the Court of Appeals, which is derived from this Court's redistricting cases, is not well-suited to the very different problem presented by this case.

It will involve the courts in areas well beyond their institutional competence; it rests on factual assumptions which have not been demonstrated; and it invites endless litigation over the census itself and consequent redistricting. This will undermine the legitimacy not just of the census itself, but of the representative branches of government whose composition depends upon the census.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE THE SECRETARY OF COMMERCE TO "ADJUST" THE CENSUS COUNT.

The Secretary of Commerce decided, after extensive deliberation, Pet. App. 135-416, not to "adjust" the census count. Pennsylvania submits that the proper standard for reviewing that decision should be derived from *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992), and *Department of Commerce v. Montana*, 503 U.S. 442 (1992), and not from state redistricting cases such as *Wesberry v. Sanders*, 376 U.S. 1 (1964), and its progeny. In *Franklin* and *Montana*, the Court held that constitutional claims involving the census and the reapportionment of Congress are justiciable. *Franklin*, 112 S.Ct. at 2776 (census); *Montana*, 503 U.S. at 459 (reapportionment). In both cases, however, the Court recognized that the Constitution entrusts these tasks, in the first instance, to other branches of government, whose decisions are entitled to considerable deference from the courts.

In *Franklin*, the Court began by recognizing that the decennial census is to be conducted "in such Manner as [Congress] shall by Law direct," *id.*, 112 S.Ct. at 2771, *quoting* U.S. Const., Art. I, §2, cl. 3 (bracketed matter the Court's), and that Congress in turn has authorized the Secretary of Commerce to take the census "in such form and manner as [s]he may determine." *Franklin*, 112 S.Ct. at 2771, *quoting* 13 U.S.C. § 141(a)(bracketed matter the Court's). The Court ended by asking simply whether the Secretary's decision was "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S.Ct. at 2777.

In *Montana*, the Court recognized Congress' broad authority to reapportion itself among the States, and

recognized as well that the *Wesberry* standard of "complete equality for each voter," *Montana*, 503 U.S. at 463, has little usefulness outside of the context in which it arose--drawing district lines *within* a State. "Neither mathematical analysis nor constitutional interpretation provides a conclusive answer....The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course." *Ibid.* Congress' choice among courses is thus entitled to "far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Id.*, at 464.

Pennsylvania submits that the Court should decide this case in the same way that it decided *Franklin* and *Montana*: by asking whether the Secretary's decision is "consistent with the constitutional language and the constitutional goal of equal representation," while recognizing that the Constitution and Congress have entrusted the Secretary with broad discretion in conducting the census, and that there may well be more than one constitutionally permissible course for the Secretary to choose. Viewing the Secretary's decision against this standard, Pennsylvania has no doubt that the District Court was correct in refusing to disturb it.

1. Turning first to the constitutional language, Pennsylvania has considerable doubt that the "adjustment" contemplated by the respondents is even permitted, let alone required, by the Constitution. As the Court observed in *Franklin*,

> Article I, §2, cl. 3 of the Constitution provides that Representatives "shall be apportioned among the several States ... according to their respective Numbers," which requires, by virtue of §2 of the Fourteenth Amendment, "counting the whole number of persons in each State."

> The number of persons in each State is to be calculated by "actual Enumeration," conducted every 10 years, "in such manner as [Congress] shall by Law direct." U.S. Const., Art. I, §2, cl. 3.

112 S.Ct. at 2770-71. The adjustment contemplated, however, would not be an "actual Enumeration," nor would it count the number of persons "in each State."

On the first point--that the adjustment would not be an "actual Enumeration"--the Secretary pointed out that the adjustment is *not* a process of finding actual persons who were missed by the census and adding them into the count.

> [M]any civic leaders are under the impression that an adjustment will fix a particular problem they have identified--for example, specific housing units or group quarters that they believe we missed. It does not do so.

Pet. App. 144. Rather, the adjustment is a statistical manipulation of data to generate a new population estimate; it does this, essentially, by dropping from the total some people who were actually counted, and by counting other people twice.

> [A]n adjustment ... would add over 6 million unidentified people to the census by duplicating the records of people already counted ..., while subtracting over 900,000 people who were actually identified and counted.

Ibid. This is not what most people would describe as an "actual Enumeration."

Moreover, the adjustment is reached by extrapolating to communities, States, and the Nation the results of a relatively small sample of 5,000 blocks. Pet. App. 56-57. Thus, as the Secretary said, by definition the adjustments for any particular community "are often based largely on data gathered from communities in other states." Pet. App. 144. The result would be that,

> for the first time, the apportionment [of the House of Representatives] would not be determined solely on the basis of the number of persons within each State's borders....For example,...the certified population count for Delaware would depend on the results of the [sample] in Maryland, the District of Columbia, West Virginia, Virginia, North Carolina, South Carolina, Georgia and Florida.

Pet. App. 251-52. This, Pennsylvania submits, would contravene the Fourteenth Amendment's command that the apportionment of the House be based on the number of persons "in each State."

2. Even if the Constitution does not positively forbid this kind of adjustment in the census count, it surely does not require it. Subjecting the results of the census' "actual Enumeration" to this kind of statistical manipulation would depart dramatically from the established practice of the past 200 years; as the Secretary observed, it would be "a fundamental change in the way we count and locate the persons residing in the United States." Pet. App. 248. *See Franklin v. Massachusetts*, 112 S.Ct. at 2785-86 (Stevens, J., concurring in part and concurring in the judgment)(in reviewing Secretary's decisions, courts may look to "long-held administrative tradition"). Such a "fundamental change"

should be forced upon the country only on a clear showing of its constitutional necessity, but it is precisely here that the Court of Appeals' analysis breaks down.

There is no clear evidence that the adjustment contemplated would improve the accuracy of the census for the only purpose which is constitutionally relevant: ascertaining the *relative* populations of the States so as to reapportion the Congress among them. The constitutional focus, in other words, must be on what the Secretary called "distributive accuracy--that is, getting most nearly correct the proportions of people in different areas," Pet. App. 146-47, rather than "numeric accuracy," or "getting absolute numbers right." Pet. App. 184.[1] That was the Secretary's conclusion, Pet. App. 146-47, 184, and he was certainly correct.

Even at the level of technical statistical analysis, it was far from clear that an adjustment would improve the distributive accuracy of the census. The technical issues involved are, according to the Secretary, "at the forefront of statistical methodology." Pet. App. 144. Expert opinion was divided, Pet. App. 139-40, and the Secretary ultimately concluded that the case for an adjustment had not been made:

> [T]he evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration....Simply correcting for the estimated net undercount can improve numeric accuracy but significantly worsen distributive

---

[1]Perhaps counter-intuitively, the two do not go hand in hand. The Secretary's decision includes an illustration of how an adjustment could improve the numeric accuracy of the total population count for the Nation, and for each State within the Nation, while simultaneously *decreasing* its distributive accuracy, thus depriving some States of the representation to which their share of the population would entitle them. Pet. App. 183.

> accuracy. We can see that we missed people in most areas, but we lack a tool which can improve the distribution of population for the purposes of political representation and funding.

Pet. App. 185.

Beyond the technical statistical issues, however, the Secretary was troubled by the implications of an adjustment for future censuses. First, and most troubling, the adjustment process exposes the census to the possibility of political or other manipulation to achieve a preferred result. According to the Secretary, it was impossible to prespecify the adjustment procedure in all respects. Pet. App. 228. As a result,

> in the adjustment procedure an individual or responsible group must make choices which have politically significant effects ... that can be transparent to those making the choices....[S]mall changes in methodology can move seats in the House. It is also true that small changes in the census enumeration can move seats in the House as well, but no individual involved in the enumeration process can predict how.

Ibid; Pet. App. 236-37 ("Decisions that may be nearly equally defensible from a technical standpoint may have very different outcomes which can be known in advance of the decisions.") This fact alone should make anyone think hard, and hesitate long, before imposing such an adjustment on the country. The perception, if not indeed the reality, of such partisan manipulation of the census can only increase popular cynicism toward the representative branches of government, and undermine their legitimacy.

Second, the possibility of post-census adjustments may well undermine the efforts of the Census Bureau to obtain the best possible count during the actual enumeration. *See* Pet. App. 233-35. The Secretary feared that "an adjustment will remove the incentive that [local] officials and groups currently have to provide active support in achieving a complete count," Pet. App. 234, by providing a false sense of security that any shortcomings in the actual enumeration would be made good in the adjustment. An adjustment could thus well set in motion a downward spiral in which deteriorating census counts become the justification for greater and greater "adjustments," which in turn undermine the census still more.

3. The Court of Appeals, however, took quite a different approach to this case. Far from deferring to the Secretary's decision, the Court of Appeals held instead that that decision should be subjected to a form of "*heightened* scrutiny," Pet. App. 34 (emphasis added), which the Court of Appeals derived from this Court's decisions involving state redistricting. The Court of Appeals, looking to such cases as *Wesberry v. Sanders*, *supra*, and *Karcher v. Daggett*, 462 U.S. 725 (1983), Pet. App. 37, said that the Secretary's decision not to adjust the census count was similar to a State's failure to equalize the populations among its legislative districts, and would have to be similarly justified. The Court of Appeals thus held that on remand to the District Court, the Secretary would have to prove that his decision "(a) furthers a governmental objective that is legitimate, and (b) is *essential* for the achievement of that objective." Pet. App. 40 (emphasis added). Pennsylvania submits, however, that this approach is deeply flawed.

In the first place, the underlying standard of the *Wesberry* line of cases--precise mathematical equality among districts--is ill-suited to the problem at hand. Dividing a known population equally among a finite number of districts

is not the same sort of problem as getting the best possible count of that population in the first place. Redistricting decisions are "capable of being reviewed under a relatively rigid mathematical standard," *Department of Commerce v. Montana*, 503 U.S. at 464; but the issue of how best to conduct the census has required the courts to referee arcane disputes among "statisticians, demographers and census officials concerning the desirability of making a statistical adjustment to the census headcount." *Tucker v. Department of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S.Ct. 407 (1992). So foreign is this area to the courts' institutional competence that one court has remarked that "you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." *Ibid.*

Second, the Court of Appeals' application of *Wesberry* and its progeny to this case rests on that court's assumption that the adjustment contemplated would in fact bring the census closer to the goal of mathematical perfection. *See* Pet. App. 38-39. But this, as we have already demonstrated, is an extremely dubious proposition to which the Secretary does not subscribe, and it is not clear why the Court of Appeals was in a better position than the Secretary to make that judgment.

Third, the logic of the Court of Appeals' decision implies that in the future, the Secretary will be obliged similarly to justify--as *essential* to a legitimate government objective--the failure to take *any* step which, in a reviewing court's opinion, would improve the accuracy of the census. The Secretary's open-ended obligation would be limited only by the ingenuity of special-interest advocates and their experts in devising new ways to gather or manipulate the census data. In the future, then, the States can look forward to at least two, and maybe three, rounds of litigation in each redistricting cycle: first over the districts drawn on the basis of the census numbers as originally reported, then over the legality of the

census itself, and finally over any re-redistricting required by court-ordered revisions in the census results. Litigation of this kind could leave the composition of the Congress and the Electoral College, and redistricting within each State, unsettled well into each decade, with results that can only be called destructive.

CONCLUSION

For these reasons, Pennsylvania asks the Court to reverse the judgment of the Court of Appeals, and to remand the case to that Court with directions to affirm the judgment of the District Court.

Respectfully submitted,

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QUESTION PRESENTED

Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment to the 1990 census violated the Constitution when it was foreseen that a severe differential undercount of Blacks and other minorities would occur.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 94-1614
STATE OF WISCONSIN,
PETITIONER
v.
CITY OF NEW YORK, ET AL.

No. 94-1631
STATE OF OKLAHOMA,
PETITIONER
v.
CITY OF NEW YORK, ET AL.

No. 94-1985
UNITED STATES DEPARTMENT OF COMMERCE,
ET AL, PETITIONERS
v.
CITY OF NEW YORK, ET AL.

ON APPEAL FROM UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE CITY OF DETROIT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The City of Detroit submits this brief in support of the Respondents' position and urges this Court to affirm the decision of the Court of Appeals and remand the case to the district court for further proceedings in light of the Court of Appeals' Opinion.

The City of Detroit seeks to address the well documented and long-standing problem of large numbers of minorities and inner city residents not being counted during the taking of the decennial census. It is the position of the City of Detroit that the manner in which the Census Bureau conducted the 1990 decennial census in the City of Detroit resulted in a serious undercount in that large numbers of persons actually residing in the City of Detroit were not included in the City's or the State's official population count. The Secretary of Commerce's refusal to accept the recommendation of the Director of the Census Bureau that a statistical adjustment was reasonable and necessary was unconstitutional, and as a result, City of Detroit residents' representation and weight of vote in the United States House of Representative and in the Michigan State Legislature were diluted relative to that of other citizens of Michigan and of other states. Due to the racially differential undercount within the State of Michigan, the City of Detroit, which is 76% black and which contains 60% of Michigan's entire black population, was disproportionately undercounted in relation to the majority of other states and all or virtually all of the Michigan's other cities, which are all white or have substantially lower black populations than the City of Detroit. Thus, within the State of Michigan, there was a violation of the constitutional principle of "equal representation for equal numbers of people" in the United States House of Representatives.

The Facts Relating to the Undercounting of the City of Detroit in the 1990 Decennial Census[1]

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[1]The facts relating to the undercounting of the City of Detroit in the 1990 decennial census is set forth fully in the opinion of the Sixth Circuit Court of Appeals, City of Detroit v. Franklin, 4 F.3d 1367, 1369-1372

The official population count of the City of Detroit in the 1990 decennial census was 1,027,974, consisting of 777,916 blacks and 250,058 non-blacks, which gave the City of Detroit a black population of 75.7%. The black population of the State of Michigan was 1,291,706 out of a total population of 9,295,297, giving the State of Michigan a black population of 13.9%. According to the official count, 60% of Michigan's black population reside within the City of Detroit, and the remaining 513,790 black persons reside in significant numbers only in relatively few other cities. In a large majority of Michigan's cities and sub-units, there is little or no black population. City of Detroit demographers have estimated that the population of the City of Detroit as of April 1, 1990, was 1,122,659.

As in past decennial censuses, the 1990 decennial census resulted in a differential racial undercount, with blacks being undercounted disproportionately to whites. According to figures derived from the Post-Enumeration Survey ("PES") that was conducted by the Census Bureau after the census head count, the black undercount rate on the national level was 4.8%, compared to a 1.7% undercount rate for whites. According to the undercount figures for the State of Michigan derived from the PES, Michigan's undercount was 108,706, with an undercount for Detroit of 37,026, or approximately 34% of the total. Thus, with respect to the PES figures, it is not disputed that the City of Detroit, with its large black population, was disproportionately undercounted in relation to all or virtually all other states and all of Michigan's other cities and sub-units, which are all-white or have substantially lower black populations than the City of Detroit. When the official population count of the census was used to reapportion

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(6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994).

Michigan's congressional representation, it followed that the residents of the City of Detroit, which was disproportionately undercounted in relation to all or virtually all of Michigan's other cities and sub-units and other states, received proportionately less congressional representation in the United States House of Representatives and Michigan Legislature than was received by the residents of other states and of the other cities and sub-units in the State of Michigan.[2]

Congress has established numerous programs of grants-in-aid to cities and other sub-units that are based on the population of the cities and sub-units, as contained in the official population count prepared and certified by the Census Bureau in connection with the decennial census and/or the mid-year census authorized under 13 U.S.C. § 141(d)(e). Such programs, under which the City of Detroit

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[2] To illustrate, since Michigan, with an officially reported population count of 9,295,297, is entitled to 16 seats in the House of Representatives, each Congressional district within the State of Michigan should have approximately 580,956 persons. The officially reported population count of the City of Detroit is 1,207,974, so that, as reported, the City of Detroit would embrace 1.769 Congressional districts. If an adjustment for the racially differential undercount had been made in accordance with the figures derived from the Post-Enumeration Survey, Michigan's total population would be approximately 9,404,000, so that each Congressional district would contain approximately 587,750 persons. With an adjusted population count of 1,065,000 according to the Post-Enumeration Survey, instead of an official population count of 1,027,974, the City of Detroit would embrace 1.811 Congressional districts instead of 1.769. Thus, the use of the unadjusted official population count to determine Congressional representation within the State of Michigan means that residents of the City of Detroit have proportionately less representation in the House of Representatives than the residents of all or virtually all of the other cities and sub-units in Michigan.

receives substantial amounts of federal funds, include Community Development Block Grants, Rental Housing Rehabilitation, Emergency Shelter Grants, and Urban Mass Transit Capital and Operating Assistance. Because the population of the City of Detroit, as reported by the Census Bureau in the official population count of the 1990 decennial census, was substantially less than the City's actual population, and substantially less than what its population would have been if an adjustment had been made for the racially differential undercount nationwide and/or within the State of Michigan, the City of Detroit received substantially less amounts of federal funds under these programs than it otherwise would have been entitled to receive.

The City of Detroit filed suit in the Eastern District of Michigan on July 25, 1991, with federal jurisdiction premised on 28 U.S.C. § 1331, alleging two counts of constitutional violation. The plaintiffs sought to compel an adjustment or revision of the census for Michigan alone. City of Detroit v. Franklin, 4 F.3d 1367, 1377 (6th Cir. 1993), cert. denied, ___ US ___, 114 S.Ct. 1217 (1994). Count I, the undercount claim, alleged that the manner in which the Census Bureau conducted the 1990 decennial census in the City of Detroit resulted in a serious undercount in that large numbers of persons actually residing in the City of Detroit were not tabulated and so were not included in the City's official population count. The undercount claim related to the way the Census Bureau conducted the census in Detroit. The facts relating to the way in which the census was conducted in Detroit are set out fully in the opinion of the Sixth Circuit Court of Appeals, City of Detroit v. Franklin, supra, at 1369-1372. Count II, the statistical claim, alleged that as a result of the failure to make a statistical adjustment, plaintiff Young's (then Mayor Coleman A. Young) and other residents of the City of

Detroit representation and weight of vote in the United States House of Representatives were diluted relative to that of other citizens of Michigan and other states when the official population count of the cities and sub-units of the State of Michigan, as reported and certified by the Census Bureau, was used in the reapportionment of Michigan's congressional representation following the 1990 decennial census.

The basis of the plaintiffs' statistical adjustment claim was that because of the concentration of Michigan's black population within the City of Detroit and a few other areas in Michigan, a statistical adjustment for the racially differential undercount within the State of Michigan, under any method of adjustment, would produce an official population count for the cities and sub-units of the State of Michigan that, on balance, would be more accurate, or "closer to the truth," than an official population count based on the raw unadjusted data alone. The refusal to make a statistical adjustment was unconstitutional. The "PES" data indicated that the undercount for the City of Detroit was 37,026 out of Michigan's total undercount of 108,708. The failure to adjust the undercount for City of Detroit residents and other minorities who live in urban areas with high black populations, deprived minorities of their right of equal representation in the United States House of Representatives, and in the State Legislature of Michigan, and the lost of substantial sums of funds. Thus, the refusal of the Secretary of Commerce to adjust the census severely affected the City of Detroit on the national and state levels.

The district court granted the defendant Secretary of Commerce motion for summary judgment on both counts of the complaint on the ground that the plaintiffs "failed to state a violation of any judicially enforceable constitutional right." City of Detroit v. Franklin, 800 F.Supp. 539, 540 (E.D.

Mich. 1992). The Sixth Circuit Court of Appeals in City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993), affirmed the district court's grant of summary judgment. The Sixth Circuit, relying on Tucker v. United States Department of Commerce, 958 F.2d 1411 (7th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 407 (1992), stated that a "claim to a census adjustment invokes no judicially administrable standards." Id. at 1418.

STATEMENT OF THE CASE

Amicus adopts the statement of the case as presented by Respondent City of New York, but wishes to emphasize those facts surrounding the undercounting which are peculiar to the City of Detroit as stated in the Statement of the Amicus Curiae Interest and as stated in the City of Detroit v. Franklin, 4 F.3d 1367, 1369-1372 (6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994).

SUMMARY OF ARGUMENT

The Apportionment Clause, Article I, Section 2, Clause 3 (Art.I, §2, cl.3) requires that the Census Bureau make a tabulation of the population of each state and of each city and sub-unit within a state that as accurately as possible includes all person reasonably capable of being determined to reside within each state and within each city and sub-unit within a state. This constitutional obligation is breached if the census is conducted in a particular locale, such as the City of Detroit, in such a manner that substantial numbers of persons are in fact missed or undercounted, so that the official population count for that place as reported by the Bureau is substantially less than its actual population and results in a serious undercount of minorities. A breach also

occurs if the Secretary of Commerce fails to use proven statistical techniques to adjust the official population count among the states and of the cities and sub-units within a state for the admittedly racially differential undercount, when the Census Bureau has declared that these techniques would increase the accuracy of the census and correct the undercount of minorities. Where an official population count as adjusted would more accurately report the actual population of a state and of the cities and sub-units within the state, than an official population count based on the raw unadjusted census data alone, which predictably results in a differential undercount of members of minority groups, the constitution has been violated.

The constitutional basis for the decennial census relates entirely to the apportionment of representation in the United States House of Representatives among and within the several states and to the representation of persons within that body in accordance with the principle of equal representation for equal numbers of people. In regards to the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives, the differential undercounting of minorities is a serious problem, because it is not randomly distributed. The racially differential undercount for blacks in the 1990 Census was about three times that for non-blacks. This means that cities like the City of Detroit, with its 75.6% black population, are disproportionately undercounted in relation to virtually all other states and all of Michigan's other cities which have substantially lower black populations than the City of Detroit. Thus, the State of Michigan, on the national level, and City of Detroit residents received proportionately less congressional representation in the United States House of Representatives than was received by other cities in other states and other cities in the State of Michigan.

Accordingly, within the State of Michigan, and among other states similarly situated, there has in fact been a violation of the constitutional principle of equal representation.

A loss of representation raises a concern of constitutional dimension, and challenges to apportionment are fully justiciable. The constitutional obligation of the Census Bureau to conduct the most accurate census that it is reasonably possible to conduct, relates to and is derived from the constitutional function of the decennial census: "to enumerate the whole number of persons in each State" for the purpose of apportionment of representation in the House of Representatives." First, Art. I, § 2, cl.3, requires that the apportionment of Congressional representation among the several states and within each state take place strictly in accordance with the principle of equal representation for equal numbers of people. Second, the official population count of the several states and of the cities and sub-units within each state, as tabulated and certified by the Census Bureau, is the constitutional basis for the apportionment of Congressional representation among the several states, and is in fact the only constitutionally permissible basis for the apportionment of Congressional representation within each state. This being so, the official population count of all of the several states and of each city and sub-unit within a state must be as accurate as is reasonably possible and must not disproportionately fail to include persons living in a particular state or states in relation to persons living in other states or persons living in a particular city or sub-unit within a state in relation to persons living in other cities or sub-units in the state.

Minority residents of the disproportionately undercounted states or the cities and sub-units within a state will in actuality have less representation in the House of

Representatives than the residents of the other states and the residents of the cities and sub-units within a state for whom the official population count more accurately reports their actual population. Since the right to vote in a free and unimpaired manner is preservative of other basis civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

The principle of equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality or for which justification is shown. The effect of the racial differential undercount, which was left uncorrected, was to create a deviation from an accurate census, far more than is constitutionally tolerable.

Clearly, the differential undercounting of minorities was not unavoidable. The Court of Appeals found to the contrary as the Secretary of Commerce conceded that "PES adjusted estimates reflect more accurately the total population and the ethnic population of the country." The record clearly established in the instant case that no legally acceptable justification for tolerating the differential undercount existed.

Art. I, § 2, cl. 3 of the United States Constitution requires that the official decennial population count reflect as accurately as is reasonably possible, the true population of the state, cities, and other governmental sub-units within each state. The official population count using only raw unadjusted census data, does not accurately reflect the actual population of the states, and governmental units within the states. Raw unadjusted census data dilutes the weight of a

citizen's vote and strikes at the heart of representative government. The failure to adjust the data of the decennial census for a known undercount of minorities violates the Constitution and Article I, § 2, cl. 3, which guarantees that all people will have their vote counted equally with other persons.

Because of the nature of the right, the Court of Appeals correctly applied heightened judicial scrutiny of the Secretary's decision. The Court of Appeals properly disapproved of the district court's extreme deference. Following the Supreme Court's teachings and analysis therein in a line of authority of caselaw that runs from Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), through Karcher v. Daggett, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), the Court of Appeals observed that the requirement of a "good-faith effort" to achieve equality, is imposed on federal, as well as state, actors, where allocation of political representation is at issue. Therefore, the Court of Appeals was correct in ruling that the United States government must explain what legitimate governmental objective it relies upon to support its decision to refuse to adjust the census.

ARGUMENT

I. THE SECRETARY'S DECISION NOT TO UNDERTAKE A STATISTICAL ADJUSTMENT OF THE 1990 CENSUS WAS INCONSISTENT WITH THE CONSTITUTION AS THE APPORTIONMENT CLAUSE IMPOSES A JUDICIALLY COGNIZABLE OBLIGATION ON THE CENSUS BUREAU TO SUBMIT AN OFFICIAL

POPULATION COUNT FOR EACH STATE AMONG THE STATES AND FOR THE CITIES AND SUB-UNITS WITHIN EACH STATE THAT AS ACCURATELY AS POSSIBLE INCLUDES ALL PERSONS REASONABLY CAPABLE OF BEING DETERMINED TO RESIDE WITHIN EACH STATE AND WITHIN EACH CITY AND SUB-UNIT OF A STATE.

The heart of this case involves the constitutional guarantee of equal representation - an equal number of votes for an equal number of people. The issue is whether Plaintiffs-Respondents' constitutional rights were violated by the Secretary of Commerce refusal to adjust the census when it was undisputed that the Post Enumeration Survey (PES) resulted in a more accurate count than the original census and would have substantially lessened the minority differential undercount. City of New York v. Department of Commerce, 34 F.3d 1114, 1122-23 (2nd Cir. 1994). The Secretary's refusal to use the more accurate data was inconsistent with the constitutional goal of equal representation.

The Apportionment Clause, Art.I., § 2, cl.3,[3]

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[3] The apportionment clause of the original constitution reads as follows:

> Representatives ... shall be apportioned among the several States ... according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons ... and excluding Indians not taxes, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years,

requires that the Census Bureau make a tabulation of the population of each state and of each city and sub-unit within a state that as accurately as possible includes all person reasonably capable of being determined to reside within each state and within each city and sub-unit within a state. This constitutional obligation is breached if the census is conducted in a particular locale, such as the City of Detroit, in such a manner that substantial numbers of persons are in fact missed, so that the official population count for that place as reported by the Bureau is substantially less than its actual population and results in a serious undercount of minorities. A breach also occurs if the Secretary of Commerce fails to use proven statistical techniques to adjust the official population count among the states and of the cities and sub-units within the state for the admittedly racial differential undercount, which the Census Bureau declared would increase the accuracy of the census and correct the disproportionate undercount of minorities. City of New York v. United States Department of Commerce, 34 F.3d 1114, 1122-23 (2nd Cir. 1994). Where an official population count as adjusted would more accurately report the actual population of a state and of the cities and sub-units within the state than an official population count based on the raw unadjusted census data alone, which predictably results in a differential undercount of members of minority groups, the constitution has been violated. The Secretary of Commerce acknowledged a differential undercount would occur in the unadjusted census. The Secretary conceded that the PES

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in such Manner as they shall by Law direct.

The fourteenth amendment later changed the first sentence of the apportionment clause to read as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

was of high quality and detected an overall undercount in the census and a differential undercount in the national level by race and ethnic origin. Id. An adjustment would have dramatically increased the accuracy of the census.

The constitutional basis for the decennial census relates entirely to the apportionment of representation in the United States House of Representatives among and within the several states and to the representation of persons within that body in accordance with the principle of equal representation for equal numbers of people. Art.I, § 2, cl.3, as amended by amend. XIV, § 2, provides first, that Representatives shall be apportioned among the several states "according to their respective numbers, counting the whole number of persons in each State," and goes on to provide for the taking of the decennial census in order that the "whole number of persons in each State" may be officially tabulated and certified by the United States government.

In regards to the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives, the differential undercounting of minorities is a serious problem, because it is not randomly distributed. The racially differential undercount for blacks in the 1990 Census was about three times that for non-blacks. This means that cities like the City of Detroit, with its 75.6% black population, are disproportionately undercounted in relation to virtually all other states and all of Michigan's other cities having substantially lower black populations than the City of Detroit. Thus, the State of Michigan, on the national level, and the City of Detroit residents received proportionately less congressional representation in the United States House of Representatives than was received by other cities in other states and other cities in the State of Michigan.

Accordingly, within the State of Michigan and among other states, there has in fact been a violation of the constitutional principle of equal representation.

A loss of representation due to census inaccuracy raises a concern of constitutional dimension. In Carey v. Klutznick, 637 F.2d 834 (2d Cir. 1980), the City of New York and New York State challenged the manner in which the Census Bureau conducted the 1980 census. The plaintiffs in that case based their claim on the Apportionment Clause and alleged that the census was conducted in such a manner that would inevitably result in an undercount, which would not be evenly distributed across the state, but would instead occur at a higher rate in low-income areas populated largely by members of minority groups. Similar to the arguments raised by the City of Detroit in City of Detroit v. Franklin, 800 F.Supp. 539 (E.D. Mich. 1992), the gravamen of their claim rested on the inaccuracy of the Address Control File prepared for New York City. Id. at 836.

The defendants in Carey v. Klutznick argued that the allegations as to the mismanagement of the census alleged in the complaint failed to state a justiciable claim under the Apportionment Clause. The Second Circuit emphatically rejected this contention. It noted that if the procedures used to conduct the census resulted in a disproportionate undercount in New York City, this could deprive the state and the city of the congressional representation to which they were entitled under the Constitution. Since this result would be inconsistent with the constitutional requirement of "equal representation for equal numbers of people" in the United States House of Representatives, Wesberry v. Sanders, 376 U.S. 1, 7-8, 84 S.Ct. 526; 11 L.Ed 2d 481 (1964), the Second Circuit Court of Appeals concluded that the plaintiffs had stated a justiciable claim under the Apportionment

Clause. Carey v. Klutznick, supra at 839. Stated simply, the Second Circuit held that the claim was justiciable, because the Apportionment Clause requires that Congress be fairly apportioned on the basis of accurate census figures. Id. As a result of the Second Circuit's decision in Carey v. Klutznick, the challenge of New York City and New York State to the accuracy of the official count of their populations in the 1980 decennial census was determined on the merits. Cuomo v. Baldridge, 674 F.Supp. 1089 (S.D.N.Y. 1987).

The Secretary's decision not to adjust the enumeration results in an undercount, and a loss of political representation arises under Article I, § 2."[4] The loss of representation violates the Constitution's goal of equal representation for equal numbers of people. As the Court observed in Carey v. Klutznick, 637 F.2d 834, 839 (2d Cir. 1980):

> [T]he Supreme Court has held that Article I, § 2 of the Constitution means that "as nearly as is practicable one man's vote in a

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[4] In an adjustment for the racially differential undercount had been made in accordance with the figures derived from the Post-Enumeration Survey, the City of Detroit would embrace 1.811 Congressional districts instead of 1.769, thereby increasing the plaintiff Young's weight of representation and weight of vote in the United States House of Representatives. This weight of representation and weight of vote would be increased still further if the population of the City of Detroit were increased to include the persons missed in the taking of the decennial census, as per the plaintiffs' undercount claim. The federal court would be constitutionally required to reopen the case and order a new apportionment because the census data on which the original apportionment was made was no longer valid, and so could not constitutionally be used as the basis for an apportionment of Congressional representation.

> congressional election is to be worth as much as another's," Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964), and that "our Constitution's plain objective [is to make] equal representation for equal numbers of people the fundamental goal," Id. at 18. See also Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

Based on those principles, the Carey court recognized that a claim that census inaccuracy would result in a loss of congressional representation arises under Article I, § 2, cl.3, of the Constitution and that constitutional challenges to apportionment are fully justiciable. Franklin v. Massachusetts, 505 U.S. 788, 112 S.Ct. 2767, 2777, 120 L.Ed 2d 636 (1992); United States Department of Commerce v. Montana, 503 U.S. 788, 112 S.Ct. 1415, 1426-27, 118 L.Ed.2d 87 (1992). Thus, the apportionment clause does not represent a textually demonstrable constitutional commitment to the political branches (Congress or the President) of constitutional questions relating to the decennial census or the use of census data for the apportionment of congressional representation. United States Department of Commerce v. Montana. Accordingly, the apportionment clause can be the source of judicially cognizable obligations imposed on the Census Bureau with respect to the conduct of the census, and the determination of the official population count among the states and of the cities and sub-units within a state.

In the very recent case of United States Department of Commerce v. Montana, supra, 112 S.Ct. 1415 (1992), the State of Montana challenged the constitutionality under the Apportionment Clause of Congress' use of the "equal proportions" method to allocate seats in the United States

House of Representatives between the states, contending that Congress was constitutionally required to use the "method of harmonic mean" instead. The Government argued that "Congress' selection of any of the alternative apportionment methods involved in this litigation is not subject to judicial review," and that, "the choice among these methods presents a 'political question' not amenable to judicial resolution." Id. at 112, S.Ct. at 1424.

In rejecting this contention, the Supreme Court emphasized that the Government was confusing the justiciability of the issue of whether the Constitution required Congress to select a particular method of apportionment with the substantive constitutional question of whether the method chosen by Congress violated the Constitution. Id., 112 S.Ct. at 1425. That substantive constitutional question was fully justiciable by the courts, since as the Court stated: "The controversy between Montana and the government turns on the proper interpretation of the relevant constitutional provisions. As our previous rejection of the political question doctrine in this context should make clear, the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary." Id., 112 S.Ct. at 1425-6 (emphasis added).

The principle of equal representation for equal numbers of people in the United States House of Representatives applies not only to the apportionment of representation among the several states, but also to the apportionment of Congressional representation within each state, and drawing lines for the allocation of congressional and legislative seats within states. In Wesberry v. Sanders, 376 U.S. 1, 8, 84 S.Ct. 526, 530, 11 L.Ed.2d 481 (1964), the Supreme Court held that Art. I, § 2, cl.3, requires "as nearly as is practicable, one man's vote in a congressional

election to be worth as much as another's." Furthermore, the apportionment clause controls the apportionment of Congressional representation within each state, as well as among the several states, and requires that Congressional apportionment within each state take place strictly in accordance with the principle of equal representation for equal numbers of people. Subsequent decisions of the Court have made it clear that the apportionment of Congressional representation within a state must follow the principle of equality. A state must make a good-faith effort to achieve precise mathematical equality, and the state has the burden of justifying each variance from that standard, no matter how small. Karcher v. Daggett, 462 U.S. 725, 730-31, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983); Kirkpatrick v. Preisler, 394 U.S. 526, 530-31, 89 S.Ct. 1225, 22 L.Ed. 2d 519 (1969).

The holding in Wesberry and the cases following also make it clear that the constitutional function of the decennial census, to ensuring that the House of Representatives should represent "persons according to their respective numbers," includes the determination of the population of the cities and sub-units within each state, so that Congressional districts within each state can be drawn in accordance with the principle of "equal representation for equal numbers of people." And as the Court noted in Kirkpatrick, supra at 531: "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."

The constitutional obligation of the Census Bureau to conduct the most accurate census that it is reasonably possible to conduct, relates to and is derived from the constitutional function of the decennial census: "to enumerate the whole number of persons in each State" for the purpose

of apportionment of representation in the House of Representatives." First, Art. I, § 2, cl.3, requires that the apportionment of Congressional representation among the several states and within each state take place strictly in accordance with the principle of equal representation for equal numbers of people. Second, the official population count of the several states and of the cities and sub-units within each state, as tabulated and certified by the Census Bureau, is the constitutional basis for the apportionment of Congressional representation among the several states, and is in fact the only constitutionally permissible basis for the apportionment of Congressional representation within each state. This being so, the official population count of all of the several states and of each city and sub-unit within a state must be as accurate as is reasonably possible and must not disproportionately fail to include minority persons living in a particular state or states in relation to persons living in other states or minority persons living in a particular city or sub-unit within a state in relation to persons living in other cities or sub-units in the state.

A disproportionate undercount of the residents of a particular state or the residents of a particular city or sub-unit within a state will lead to a constitutional distortion. If the official population count of a state or of a city or sub-unit within a state, as reported and certified by the Census Bureau, does not as accurately as is reasonably possible report the number of persons residing in that state in relation to the actual number of persons residing in other states, or the actual number of persons residing in a city or sub-unit within a state in relation to the actual number of persons residing in other cities and sub-units within the state, when the official population count is used in Congressional reapportionment following the decennial census, the reapportionment will not in fact take place in accordance

with the principle of "equal representation for equal numbers of people." Residents of the disproportionately undercounted states or the cities and sub-units within a state will in actuality have less representation in the House of Representatives than the residents of the other states and the residents of the cities and sub-units within a state for whom the official population count more accurately reports their actual population. The purpose of redistricting is to ensure residents enjoy equal representation in their legislatures. Kirkpatrick v. Preisler, supra, 394 U.S. at 530. The constitutional function of the decennial census, therefore, will have been subverted, because as among the several states, and within each state, there will not in fact be "equal representation for equal numbers of people" in the United States House of Representatives.

The Supreme Court in Wesberry v. Sanders, supra, 376 U.S. at 18, held that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

As the Supreme Court in Reynolds has explained:

> [T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

Reynolds v. Sims, 377 U.S. at 560-61. In accordance with these principles, this Court has recognized that a dilution of the votes of state residents, "particularly members of minority groups - vis-a-vis those of other residents of the state with respect to the state legislature", that results from census inaccuracy, impairs rights secured by the Constitution. Carey v. Klutznick, 637 F.2d at 836.

As a result, of both the undercount within the City of Detroit and the failure of the Secretary of Commerce to adjust for the racially differential undercount, there has been an extreme disproportionate undercount of minorities of the City of Detroit in relation to most of the other cities and sub-units within the State of Michigan. It follows, therefore, that when the Congressional redistricting of Michigan was carried out in accordance with the official population count of the cities and sub-units of the State of Michigan, as reported and certified by the Census Bureau, the resulting Congressional apportionment did not in fact satisfy the constitutional requirement of equal representation for equal numbers of people in the United States House of Representatives. Residents of the City of Detroit do not in fact have equal representation for equal numbers of people in the United States House of Representatives, and residents of most of Michigan's other cities and sub-units have greater representation in the House than that to which they are constitutionally entitled.

Furthermore, the concentration of the undercount among minority populations in the 1990 census means that when the unadjusted census is used for redistricting, the goal of producing districts containing the same number of residents cannot be met. Districts with more minority residents than the average for other districts with which they are being compared for redistricting purposes will therefore

have larger populations than the average district, diluting the votes of residents of the high -minority districts such as the City of Detroit. The effect of the undercount left uncorrected was to create a deviation from an accurate census, far more than is constitutionally tolerable. See Karcher v. Daggett, supra, 462 U.S. at 731-34. Minorities and those who live in communities where they are concentrated bear the burden of that deviation from equality of population in the dilution of their votes.

The principle of equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality or for which justification is shown. Kirkpatrick v. Preisler, supra, 22 L.Ed.2d 519, 524. Clearly, the racial differential undercount among minorities was not unavoidable. The Court of Appeals found to the contrary, as the Secretary of Commerce conceded that "PES adjusted estimates reflect more accurately the total population and the ethnic population of the country." City of New York v. U.S. Department of Commerce, supra, 34 F.3d at 1122-1123.

The record clearly established in the instant case that no legally acceptable justification for tolerating the differential undercount existed, City of New York v. U.S. Department of Commerce, supra, 34 F.3d at 1130-1131. The differential undercounting of minorities is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. In Reynolds v. Sims, the Supreme Court enunciated that:

> "Neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities

> from population based representation. Citizens, not history or economic interests, cast votes." Reynolds v. Sims, supra, 377 U.S. at 579-580, 12 L.Ed.2d at 537-538.

Thus, the Secretary of Commerce's concern with upholding "a two-hundred year tradition of how we actually count people", City of New York v. U.S. Dept of Commerce, supra at 1122, cannot withstand constitutional muster.

Art. I, § 2, cl. 3 of the United States Constitution requires that the official decennial population count reflect as accurately as is reasonably possible, the true population of the state, cities, and other governmental sub-units within each state. The official population count using only raw unadjusted census data, does not accurately reflect the actual population of the states, and governmental units within the states. Raw unadjusted census data dilutes the weight of a citizen's vote and strikes at the heart of representative government. See Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964). The failure to adjust the data of the decennial census for a known undercount of minorities violates Art. I, § 2, cl. 3, which guarantees that all people will have their vote counted equally with other persons. The debates at the Convention indicated that the founders of the Constitution wanted to ensure fair representation. Nothing in Art. I, § 2, cl. 3 prohibits an accurate statistical adjustment of the decennial census to obtain an accurate count. Quite to the contrary, Article I of the Constitution, which mandates equal apportionment of representatives, also mandates an adjustment to obtain a more accurate census of the actual population. When the allocation of federal resources and the apportionment of congressional representatives rest on an accurate census, it is unconstitutional for the Secretary of

Commerce to refuse to adjust the census data, when he knew that an undercount which heavily disfavored blacks and other minorities occurred, and there is a proven statistical method in existence to correct the undercount.

Because of the nature of the right, the Court of Appeals correctly applied heightened judicial scrutiny of the Secretary's decision. The Secretary's decision placed other incidental factors above lessening the disproportionate undercounting of minorities. City of New York v. Department of Commerce, supra, 34 F.3d. at 1130-1131. The critical paragraph in the Court of Appeals' decision, in which the court explained the basis for its conclusion that the Secretary's judgment was not made in good faith, is as follows:

> In the present case, the findings of the district court . . . plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable. Those findings are supported by, inter alia, the Secretary's acknowledgement that the PES-indicated adjustments would likely not only make the census more accurate nationally, but would also reduce the disparate impact of the census' inaccuracies on minority groups, and that he gave other factors priority over achievement of greater accuracy. For example, he stated that he valued "distributive accuracy" over numerical accuracy; and in stating that an adjustment would not be made because it would not result in greater distributive accuracy, the Secretary revealed

> that he would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate. Id.

The Secretary conceded that the "PES-adjusted estimates reflect more accurately the total population and the racial and ethnic populations of the country." City of New York v. Department of Commerce, supra, 34 F.3d at 1122, 1130. With that concession, the Secretary also conceded that an adjustment would improve the distributive accuracy of the census. Id. "The impact of the differential undercount was naturally more severe in those areas in which racial and ethnic minorities were more concentrated." Id. at 1131.

The Court of Appeals properly disapproved the district court's extreme deference. Following this Court's teachings and analysis therein in the line of case law authority that runs from Wesberry v. Sanders, 376 U.S. 1 (1964), through Karcher v. Daggett, 462 U.S. 725 (1983), the Court of Appeals observed that the requirement of a "good-faith effort" to achieve voter equality, where allocation of political representation is at issue, is imposed on federal, as well as state, actors. Montana, supra, 503 U.S. at 460-464; City of New York v. Department of Commerce, supra, 34 F.3d at 1129, 1131. The Court of Appeals recognized that constitutional constraints on the apportionment of the House of Representatives mean that "the goal of precise equality in voting power is 'illusory for the Nation as a whole,'" (quoting Montana, 503 U.S. at 463), but concluded that "[t]he impossibility of achieving precise mathematical equality is no excuse for not making

this mandated good-faith effort." City of New York v. Department of Commerce, supra, 34 F.3d at 1129.

A long line of cases rooted in the Constitution and its history has established that the right to vote is one crucial to the presentation of our democratic society and that such right cannot be abrogated. In Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1963), the Supreme Court stated:

> "The right to vote freely for the candidate of one's choice is the essence of a democratically society and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Because the right to vote involves a fundamental right, coupled with the fact that the severe undercounting of minority and ethnic groups diluted the minority vote, the court correctly held that a heightened degree of scrutiny should occur. City of New York, supra, at 1128. The right to have one vote's count equally is fundamental and constitutionally protected. The Equal Protection Clause guarantees the opportunity for equal participation by all voters. Dilution of the weight of a vote because of race or place of residence impairs basic constitutional rights. Reynolds v. Sims, supra, 377 U.S. at 566, 84 S.Ct. 1384, 12 L.Ed.2d 529-530.

Applying the analytic framework of Karcher, supra, 462 U.S. at 730-731, the Court of Appeals accepted the

district court's finding that the adjusted counts had been shown to be more accurate, and proceeded to the question of whether Plaintiffs had carried their burden of showing the decision to use less accurate data "was not the product of a good-faith effort to achieve equality." In considerable detail, the Court of Appeals spelled out the basis for its determination that Plaintiffs had carried that burden. City of New York v. U.S. Department of Commerce, supra, 34 F.3d at 1130-1131. The Court of Appeals correctly held that in cases involving apportionment, a plaintiff is required to show only "that the governmental entity failed to make a good-faith effort to achieve equal districts as nearly as practicable." Plaintiff need not show that the government's discrimination was not intentional. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed 2d 597 (1976).

The Supreme Court in Karcher v. Daggett, supra, 462 U.S. 725 (1983), made it clear in that case that the official population count of the cities and sub-units of the state, as reported and certified by the Census Bureau, was the only reliable indicator of the actual population of the cities and sub-units of the state, and so could be the only basis for Congressional apportionment within the state. As the Supreme Court stated: "[b]ecause the census count represents the 'best population data available,' it is the only basis for good-faith efforts to achieve population equality." 462 U.S. at 738. As the Court also noted, "Adopting any standard other than population equality, using the best census data available, would subtly erode the Constitution's ideal of equal representation." Id. at 731.

The right to protection from an individual vote being diluted, flows from "the fundamental principle in this country that the democratic system mandates equal representation for equal numbers of people without regard to

race, sex, economic status or place of residence within a state and among the states." Reynolds v. Sims, 377 U.S. 533, 560-61, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); Wesberry v. Sanders, 376 U.S. 1, 17-18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). The whole thrust of the "as nearly as practicable" approach is inconsistent with the adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. Since equal representation for equal numbers of people is the fundamental goal for the House of Representatives", Wesberry v. Sanders, supra, 376 U.S. at 18, 84 S.Ct. at 535, the "as nearly as practicable" standard requires the federal government and the state to make a good faith effort to achieve equality. See Karcher v. Daggett; Reynolds v. Sims, 377 U.S. 533, 577, 84 S.Ct. 1362, 1389, 12 L.Ed.2d 506 (1964).

Accordingly, unless a legitimate governmental objective exists for the racially differential undercount, this Court cannot tolerate or uphold the Secretary's decision to refuse to adjust the census data. The differential undercounting of minorities may be expected to continue in future censuses, and so will again result in the subversion of the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives if the matter is not resolved, and the Secretary of Commerce is not required to prove a legitimate governmental objective exists for refusal to adjust the census.

CONCLUSION

For the reasons stated herein, the Court of Appeals' opinion should be affirmed and the case remanded to the district court for the Secretary of Commerce to explain what

legitimate governmental objective exists to support his reliance upon the unadjusted census data and his refusal to adjust the census.

Respectfully submitted,

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Date: December 8, 1995

Supreme Court, U.S.
FILED
DEC 8 1995
CLERK

Nos. 94-1614, 94-1631 and 94-1985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN,

Petitioner,

vs.

CITY OF NEW YORK, *et al.*,

Respondents.

(For Continuation of Caption See Reverse Side of Cover)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE NEW YORK CIVIL LIBERTIES UNION and THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENTS

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(For Further Appearances See Reverse Side of Cover)

STATE OF OKLAHOMA,

Petitioner,

vs.

CITY OF NEW YORK, *et al.*,

Respondents.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Petitioners,

vs.

CITY OF NEW YORK, *et al.*,

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INTEREST OF AMICI[1]

Lawyers' Committee for Civil Rights Under Law

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Lawyers' Committee. The Lawyers' Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 30 years, including cases before this Court, *see, e.g., Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986) and *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

American Civil Liberties Union and New York Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The New York Civil Liberties Union is its statewide affiliate. Since its founding in 1920, the ACLU has sought to ensure that people whose constitutional or statutory rights have been denied by the government or by government officials have an effective means of redress. The ACLU has participated directly or as *amicus curiae* in many of the cases in this Court concerning voting and/or equal rights.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

American Jewish Committee

The American Jewish Committee (AJC) is a national organization that was founded in 1906 to protect the civil and religious rights of Jews. AJC has always believed that these rights can be secure for Jews only when the rights of Americans of all faiths, races and ethnic backgrounds are equally secure. That is why AJC strongly believes that the census undercount must be corrected. Unless it is corrected, the constitutional rights of those not counted, disproportionately black and Hispanic residents of large cities, remain violated. Correcting the undercount is necessary to cure this egregious violation.

NAACP Legal Defense and Educational Fund, Inc.

The NAACP Legal Defense and Educational Fund, Inc. is a nonprofit organization under § 501(c)(3) of the Internal Revenue Code, which exists to provide free legal representation to African Americans and others who are subject to discrimination in violation of the United States Constitution and other laws. Since its establishment in 1940, it has developed a reputation for expertise in civil rights litigation through the many cases in which it has provided representation, including *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (school desegregation); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (voting rights); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (school desegregation); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment discrimination); *White v. Regester*, 422 U.S. 935 (1975) (voting rights); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (voting rights); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (voting rights). *See also NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing Legal Defense Fund as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

Puerto Rican Legal Defense and Education Fund, Inc.

Since its inception in 1972, the Puerto Rican Legal Defense & Education Fund, Inc. (PRLDEF) has worked to politically empower the Puerto Rican and Hispanic community. PRLDEF has represented Latinos in many cases protecting and furthering their voting rights. The issues presented in this appeal concerning the census undercount are central to protecting the constitutional and statutory rights of the Latino community. The underrepresentation of Latinos in Congress will never be fully addressed until the undercount of Latinos by the census is remedied.

STATEMENT OF CASE

Since its inception, the decennial census has historically undercounted the number of people in the United States. It has also historically undercounted racial and ethnic minorities at a greater rate than non-minorities. For at least the last five censuses, the historic undercount of minorities has been well documented and has continued, largely unchanged, decade after decade. Currently, certain minorities—specifically, African-Americans, Hispanics and American-Indians—are being undercounted at a rate twice that of whites. The protracted and sophisticated efforts of the Census Bureau and this litigation were undertaken in an effort to prevent another undercount in the 1990 census, or, if prevention was impossible, to ensure that a reliable method was developed and utilized to correct that undercount.

By the spring of 1987, the Bureau of the Census developed a method by which the decennial census could be adjusted to correct the undercount. The parties agree that the method, known as the Post-Enumeration Survey, or PES method, increases the numerical accuracy of the census and alleviates the undercounting of minorities. The disputed question is whether the PES method is at least as distributively accurate as the unadjusted census. The Director of the Census Bureau, the agency that conducts the decennial census, recommended to the Secretary of Commerce that, because of

the adjusted census' increased accuracy, the adjustment method in calculating the 1990 census should be used. She was joined in this recommendation by a majority of the Undercount Steering Committee and other experts.

Notwithstanding the recommendation of the Census Bureau, the then-Secretary of Commerce, Robert Mosbacher, refused to adjust the census. He based his decision on a series of conclusions. He conceded that the adjustment would improve numerical accuracy and reverse the historically skewed undercount of racial and ethnic minorities. He questioned the improvements that would be achieved in distributive accuracy by adjustment. His final conclusion was that the proponents of adjustment—the vast majority of the Census Bureau experts—had not met their burden of proving the superiority of the adjustment. Thus, the 1990 census as presented to the President failed to account for more than 5 million persons, including 5% of the country's African-Americans, Hispanics and American-Indians. The District Court, applying a deferential standard, did not explicitly state which method would be most accurate, but implied that it agreed with the Census Bureau experts and stated that if called upon to review the issue *de novo* would order adjustment. *City of New York v. U.S. Dept. of Commerce*, 822 F. Supp. 906, 928 (E.D.N.Y. 1993). The Court of Appeals concluded that the record showed that the adjusted census would improve numerical accuracy, cure the undercount, and would not, at least, hinder distributive accuracy. *City of New York v. U.S. Dept. of Commerce*, 34 F.3d 1114, 1130-31 (2d Cir. 1994). Accordingly, it remanded the case to the District Court to review the Secretary's decision not to use the PES method under a non-deferential standard.

SUMMARY OF ARGUMENT

Equal representation is the foundation of our representative democracy. The decennial census is an essential component of the right to equal representation because it is the basis for the apportionment of members to the House of Repre-

sentatives and the drawing of state and local representative districts. Because the census is determinative of equality of voting rights, Art. I, § 2 requires a decennial census that is as accurate as practicable. Thus, the issue presented to this Court is whether the Secretary of Commerce's decision regarding the census, one that impacts directly on the one-person, one-vote principle that this Court has fiercely protected, will be subject to meaningful judicial review.

Amici argue that the census is of such critical importance that its accuracy cannot be left solely to the discretion of the political branches. It must be subject to a greater degree of judicial scrutiny than the "arbitrary and capricious" standard employed by the District Court. To subject the accuracy of the census to meaningful judicial review means that, on remand, the District Court should determine whether the Secretary acted in objective good faith to ensure a census that is as accurate as practicable.

Petitioners argue that such a degree of judicial review is not necessary because the Secretary determined that there was no violation of the constitutional right to equal representation, since, in his view, the adjusted census did not increase distributive accuracy. Amici argue that this critical decision affecting constitutional rights should not be left to the Secretary alone to decide.

Petitioners urge the Court to create a rule of deference so generous as to make the Secretary's decisions largely unreviewable. Amici contend that any census requires value-laden decisions that will have a significant effect on the accuracy of any count. There are three reasons why the courts should be involved in ensuring accuracy. First, the courts' role in analogous contexts shows that the courts can and have proven successful in counterbalancing the majoritarian impulses of the political branches. Prior to *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964), redistricting decisions by then majoritarian rural legislators failed to sufficiently protect the interests of those living in suburban and urban areas. The involvement of the courts has been critical, and successful, in abolishing those practices.

Second, there is a long-standing history of majoritarian branches of government tolerating an undercount of certain minority citizens. In the census counts, without judicial review, decisions by the executive branch failed to sufficiently protect the interests of blacks, Hispanics and Native Americans. The political branches of government, after five or more decades, have yet to adopt a corrective methodology. Third, because all methodologies, whether using adjusted numbers or unadjusted numbers, contain a myriad of value judgments often masked as "technical," the most effective method of assuring that a count is done as accurately and as value free as possible is to expose the decisions of the political branch to the searching inquiry provided by cross examination and court review.

This Court has long required the government to attempt in good faith to provide the constitutional requirement of equality of representation in a manner that is as accurate as practicable. Because the census directly bears on equal representation, the political branches delegated with the authority to undertake the census must also attempt in good faith to make it as accurate as practicable. Notwithstanding Petitioners' assertions to the contrary, neither Amici nor Respondents are demanding a mathematically precise census or the adoption of impractical methods of calculating the census. However, if the Secretary has at his disposal a practicable method to accurately calculate the census, which also alleviates the historic undercounting of minorities, and fails to adopt such a method, his action cannot be deemed to have been taken in good faith, regardless of his subjective intent. It is undisputed that the PES methodology is practicable and that it corrects the historic undercount of racial and ethnic minorities. What is left for the lower court to decide is whether it provides the most accurate census. Thus, the Court should affirm the Court of Appeals' remand of this case to the District Court to determine if the Secretary chose the method that provides for the most accurate census.

The census data forms the crux of our representational government. It is also used to determine a variety of other

matters affecting the distribution of resources and opportunities. For these reasons, an accurate census is of fundamental importance. It is particularly critical for racial and ethnic minorities, groups that historically have been underrepresented in the political process and which are most in need of sufficient representation and funding. To permit the Secretary's decision not to adjust the census to stand without meaningful judicial review is to acquiesce in the devaluation of certain members of our society. This Court must not permit the continued diminishment of any person's worth in this manner.

I

BECAUSE THE DECENNIAL CENSUS DIRECTLY IMPACTS ON FUNDAMENTAL CONSTITUTIONAL RIGHTS, THE SECRETARY'S DECISION MUST BE SUBJECT TO MEANINGFUL JUDICIAL REVIEW.[2]

A. Because the Decennial Census Directly Affects the Right to Equal Representation, Art. I, § 2 Requires A Census That Is As Accurate As Practicable

The appropriate method by which to determine the most accurate decennial census of the nation's population directly impacts on the fundamental right to equal representation, a right that forms the very core of this country's democracy. Article I, section 2 of the United States Constitution requires allocation of Representatives among the several States "according to their respective numbers." This rule of apportionment was reached after lengthy debate at the Constitutional

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[2] Amici agree with the position of Respondents that the challenge to the Secretary's decision not to use the adjusted census is justiciable, the Census Act does not bar statistical adjustment of the census, and there is no issue with respect to standing, for the reasons enumerated by the District Court and Court of Appeals. *See also Franklin v. Massachusetts*, 112 S. Ct. 2767, 2776 (1992) ("Constitutional challenges to apportionment are justiciable").

Convention of 1787 at which it was decided that a democratic allocation of political power was the only means of establishing a legitimate government. As James Madison succinctly declared, "If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all." 3 The Records of the Federal Convention of 1767 (Farrand ed. 1911) 14; *see also Wesberry v. Sanders*, 376 U.S. 1, 10 (1964). A representative branch of the legislature was therefore created, with the proviso that because the House "should represent 'people,' . . . in allocating Congressmen, the number assigned to each State should be determined solely by the number of the State's inhabitants." *Wesberry*, 376 U.S. at 13.

To ensure that the House of Representatives would be fairly apportioned among the States on a current basis, a periodic census was proposed and adopted into the Constitution. Art. I, § 2, cl. 3; *see also Wesberry*, 376 U.S. at 13 (noting that Framers endorsed proposal of periodic census as means of "assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives"). Accordingly, Art. I, § 2, as amended by the Fourteenth Amendment, requires "counting the whole number of persons in each State" to apportion the correct number of Representatives. The census was employed to guarantee that entrenched interests in the House would not obstruct necessary reapportionment. *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2771 (1992) (*quoting* S. Rep. No. 2, 71st Cong., 1st Sess., 2-3 (1929)) ("The need for [an automatic census] is confessed by the record of the past nine years during which Congress has refused to translate the 1920 census into a new apportionment. . . . As a result, great American constituencies have been robbed of their rightful share of representation.").

In our representative democracy, the complement to the equal apportionment of Representatives among the States is the equal apportionment of Representatives within a State. Equal representation cannot be had if the distribution of Representatives within a State is not equally divided because each person's vote would not have equal power. *See Wesberry*, 376

U.S. at 7-8 (in striking down apportionment of congressional seats based on wildly divergent districts, Court noted that the "Constitution's plain objective was that of making equal representation for equal numbers of people the fundamental goal"). The decennial census directly impacts upon the right to equal representation, embodied in the one-person, one-vote rule, because it is the basis upon which congressional districts within a state are drawn. The one-person, one-vote principle, which this Court has jealously guarded, is acutely affected by a less than accurate census because the distribution of Representatives within a State will not be accurately made. *See Karcher v. Daggett,* 462 U.S. 725, 738 (1983) (because the census count is the best population data available, "it is the only basis for good faith attempts to achieve population equality").

The danger that inaccuracies in the census will result in unequal congressional districts within a State is particularly acute in states with districts that have a high concentration of minority residents, as the census severely undercounts minorities by as much as 5 percent. This places the burden of underrepresentation squarely on the shoulders of those persons who have the least power in the political process and consequently the greatest need for adequate representation. Furthermore, in such a district, the votes of the citizens would not have weight equal to that of other districts, and the constitutional goal of equal representation for equal numbers would not be met. As this Court noted in *Reynolds v. Sims,* the "right of suffrage can be denied by . . . dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 554, 555 (1964).

Because the decennial census mandated by the Constitution lies at the heart of our representative democracy, Art. I, § 2 requires that the decennial census be as accurate as practicable. *See Franklin,* 112 S. Ct. at 2785 (Stevens, J., concurring) (noting that the statutory command of Art. I, § 2 "embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the

apportionment"); *Karcher*, 462 U.S. at 731 ("Adopting any standard other than population equality, *using the best census data available*, would subtly erode the Constitution's ideal of equal representation."). (Emphasis added).[3] Only an accurate census can ensure the right to equal representation through the one-person, one-vote principle. The close relationship between the census and the allocation of Representatives among the states and within a state therefore requires that decisions affecting the census be held to the same good-faith standard as those bearing on congressional districting. As the Court of Appeals declared below, the "federal government, no less than the states, is required to make a good-faith effort to achieve the Constitution's plain objective of equal representation." *City of New York v. U.S. Dept. of Commerce*, 34 F.3d at 1129.

B. An Accurate Decennial Census Is Crucial Because It Affects The Allocation Of Federal Funds, Resources and Opportunities

An accurate decennial census is also of fundamental importance because census data is used for myriad purposes, which, although not directly implicating constitutional rights, are essential. These purposes include the allocation of federal funds to states, cities and school districts for education, health, transportation, housing, community services, and job training. The census is also used to determine the just implementation of federal programs.[4] It constitutes "one of the most important sources of U.S. data for basic and applied social

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[3] The Federal Petitioners concede this requirement in their brief when they state that Congress has a "constitutional responsibility to make an actual enumeration of the population." (Brief of Federal Petitioners, at 28).

[4] Some instances where census data are used for federal funding and programs include the following:

- The Voting Rights Act requires the collection of census data to determine the implementation of bilingual voting programs to protect the rights of language minorities.

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research"; areas of research that utilize census data include race relations, the criminal justice system, education, poverty and the aging of the population.[5] In addition, census data serves many business uses, including the determination

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- The Elementary and Secondary Education Act specifically mandates that the U.S. census collect data on the poverty status of school-age children for the purpose of allocating funds to school districts.

- The Bureau of Economic Analysis relies on census data to develop income estimates for regional, state and local areas, which estimates, in turn, are used in funding formulas that allocate federal funding for Medicaid and AFDC.

- The Department of Agriculture obtains census data by state and county to determine the number of women, children and infants whose families have incomes below the maximum income limit for the Special Supplemental Nutrition Program for Women, Infants and Children (WIC).

- The Department of Justice, Immigration and Naturalization Service uses census data to plan and evaluate immigration policy.

- The Equal Employment Opportunity Commission uses census labor force data to analyze statistical evidence in class action charges of employment discrimination.

- The Department of Transportation uses census data to monitor compliance with the Federal Transit Act and the Americans with Disabilities Act.

- The Department of Agriculture uses census data to allocate grant funds and determine loan interest rates for assistance programs.

Modernizing the U.S. Census 24, 444 (Barry Edmonston and Charles Schultze, eds., National Research Council, Committee on National Statistics). This list represents only a fraction of the federal funds and federal programs that rely on the decennial census data.

[5] *Id.* at 259.

of where to construct hospitals and health clinics and the placement within communities of banks, other financial institutions, and community service providers.[6]

Since the decennial census affects the allocation of federal and state funds, resources and opportunities, it is imperative that the census be as accurate as practicable.

C. Meaningful Review By The Courts Is Necessary To Ensure That The Most Accurate Means of Computing The Census Is Used

Art. I, § 2's "high standard of justice and common sense" — "equal representation for equal numbers of people," *Karcher*, 462 U.S. at 730 — is breached when the census by which Representatives are to be apportioned is found to be inaccurate. Because an accurate census directly bears on the fundamental constitutional right of equal representation, critical decisions concerning its accuracy must be subject to meaningful judicial review.

As the Court of Appeals correctly noted, the Secretary's decision not to use the adjusted census should be reviewed under a more meaningful standard than the arbitrary and capricious test. Rather, because an accurate census represents the keystone to our constitutional democracy and to the "equal right to vote" secured by Article I, § 2, the Secretary's decision must be subjected to an exacting standard of judicial scrutiny. As the long history of cases involving apportionment and the right to vote has proven, this Court has repeatedly seen that political branches do yield to the temptation to undercount those not in the majority, whether geographically or ethnically. The Court has therefore indicated that deference to political branches is not warranted when a constitutional right is at stake. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962) (rejecting Tennessee legislators' contention that apportionment should not be reviewed by the courts); *Gray v. Sanders*, 372 U.S. 368 (1963) (invalidating Georgia primary system which gave greater weight to rural votes than urban votes); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (confirming concept that right to vote

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[6] *Id.* at 292-300.

is "too important in our free society to be stripped of judicial protection" by precluding judicial review of state congressional apportionment schemes); *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down an Alabama scheme that created wildly disparate state legislative districts); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (holding that Missouri congressional redistricting plan creating disparate districts did not meet the "as nearly as practicable" constitutional standard); *Karcher v. Daggett*, 462 U.S. 725 (1983) (rejecting New Jersey's congressional districting plan in which districts varied by size by less than 1% because the plan failed to meet a "good-faith" standard of equality). This Court's insistence on a judicial role in these cases has been phenomenally successful in protecting the right of all people to an equal say in government.

These cases demonstrate that independent review by the Court is essential for the meaningful implementation of important constitutional rights. *See also Sable Communications v. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications v. Virginia*, 435 U.S. 829, 843 (1978). As explained above, because the decennial census is the basis upon which states create congressional districts, an inaccurate census affects the one-person, one-vote principle just as acutely as when districts are widely skewed or when reapportionment is refused. Because equal representation cannot be had without an accurate census, this Court should not recoil from exercising its independent review here, just as it did not hesitate to intervene to ensure the continued health of the one-person, one-vote principle in the redistricting cases. The one-person, one-vote mandate will have little meaning if the underlying census is not as accurate as practicable.

There is an additional, powerful reason for meaningful review in this case. The decision by the Secretary of Commerce has a serious and adverse impact upon racial and ethnic minorities—groups that have traditionally needed judicial protection from the majority. Undercounting certain members of the population—in essence, denying their existence—is especially noxious when it disproportionately and negatively affects racial and ethnic minorities who have histori-

cally been prevented from full participation in the political process. H.R. Rep. No. 439, 89th Cong., 1st Sess., report at 1965 U.S.C.C.A.N. 2437 (legislative history of Voting Rights Act of 1965 noted long history of discrimination against African-Americans in the political process and the need for judicial intervention in striking down discriminatory policies due in part to the intransigence of elected officials). Within our constitutional system, the judiciary has long served as the institution designed to counter and to ameliorate the excesses of pure majoritarianism. *See, e.g., Plyler v. Doe,* 457 U.S. 202 (1982) (invalidating state law denying education to children of illegal aliens); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (striking state law requiring recipients of welfare assistance to reside in state for at least one year). So understood, this Court has long recognized the responsibility of the judiciary to protect minority interests in circumstances where the decisions of the political branches of government skew outcomes unfairly in the interests of the dominant majority. *See Reynolds v. Sims,* 377 U.S. 533 (1964); *Wesberry v. Sanders,* 376 U.S. 1, 10 (1964); *Gray v. Sanders,* 372 U.S. 368 (1963) (invalidating Georgia primary system giving greater voting power to rural residents than urban residents); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (invalidating gerrymandering of districts favoring white majority).

While equal protection claims challenging racial classifications require proof of intentional discrimination, *see Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097 (1995); *Washington v. Davis,* 426 U.S. 229 (1976), and no such claim is presented here, this Court need not be totally blind to the disproportionate undercount of African-Americans, Hispanics, and Native Americans for purposes of evaluating the Article 1, § 2 claim.[7] While the right to a census that is as "accurate as practicable" is one of general application, its trans-

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[7] Amici do not argue that the Court should depart from its established approach to equal protection analysis for purposes of evaluating claims of racial discrimination. While the Court of Appeals referred to the racially

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gression has a particular impact upon minority groups. Already often submerged within the political process, minority groups bear other difficulties when they are not counted in the most effective manner in the census process.

Judicial review is also required because the recipients and beneficiaries of federal funds and programs affected by the census are, to a large extent, racial and ethnic minorities. Thus, there is a danger that the use of a less than accurate census may deprive those most in need of funding and assistance as well as dilute their voting power.

Federal Petitioners have conceded that the census disproprotionately and negatively impacts on racial and ethnic minorities. The Secretary admitted that the census historically has undercounted minorities to a far greater extent than for non-minorities; for African-Americans and Hispanics, the census undercounted the population more than twice as much as the undercount for whites. The Census Bureau clearly considered the undercount to be significant; as the Bureau Director declared in recommending adjustment to the decennial census, "[i]t is time to correct this historical problem [of undercounting minorities]. . . .With the increasing diversity of the country . . . the problem could be larger in 2000." The Secretary also admitted that the Bureau had created a methodology that would finally end the historic undercount and provide a more accurate count of minorities in the United States.

Undercounting the national population is a significant concern. As the Bureau Director stated in her recommendation to use the adjusted census, "not adjusting would be denying that . . . 5 million persons exist. That denial would be a greater inaccuracy than any inaccuracies that adjustment may introduce." When the undercount disproportionately affects

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disproportionate impact of the failure to utilize the adjusted census, this case can be resolved under Article I, § 2. Thus, while minorities may have a particular interest in insuring that Art. I, § 2 is enforced, they need not make out a claim of discriminatory intent to protect that interest.

racial and ethnic minorities who have long been underrepresented in the political process, it is particularly grave. That the government would choose not to employ a method that would correct the historic undercount simply to maintain a "200 year tradition of counting people" is offensive and the message it imparts—minorities are not important enough to be counted—must not be countenanced.

The Federal Petitioners concede that meaningful judicial review would be required if the Secretary's decision had a negative impact on the constitutional guarantee of equal representation: "[a]bsent unequivocal evidence that an adjustment would have improved the distributive accuracy of the census, there is no constitutional basis upon which a court could set aside the Secretary's determination that no adjustment was warranted." (Brief at 24). However, federal appellants contend that judicial review is not mandated here because no constitutional right was implicated. They base this argument on the Secretary's decision that, in his view, distributive accuracy was not improved by adjusting the census and that therefore the right to equal representation was not affected. In effect, Petitioners would have this Court abdicate its role of determining whether a constitutional violation occurred to the Secretary's conclusion that no constitutional rights were violated. Amici disagree with this position for two reasons. First, Amici do not concede that the adjusted census would not improve distributive accuracy. The accuracy of the PES method is the question to be determined by the lower court on remand. More importantly, the determination of whether a constitutional right has been violated cannot be left within the discretion of the political branches. Rather, that is precisely the type of issue for the courts to decide.

The federal appellants also spend a great portion of their brief outlining the so-called technical questions that arise when adjustment is made in an effort to make them appear hopelessly technical and unfathomable by a non-statistician. The paradigmatic example of that effort is the discussion of "smoothing," the process by which the Bureau avoided

overadjusting. However, there was extensive testimony at trial about the "smoothing" process and, contrary to the government's suggestions, the District Court appeared perfectly capable of understanding the process and the assumptions on which it is based. More importantly, the government's argument implicitly suggests that difficult technical questions arise only when the adjustment methodology is used. That is incorrect. Value judgments and technical issues are imbedded in every decision made with respect to the use of the nonadjusted census. The government's proposed distinction between redistricting cases and unadjusted census counts on the one hand, which the government asserts involve simple arithmetic, and adjusted census counts on the other, which involves extremely technical questions, is both false and inappropriate in constitutional analysis. The degree of protection afforded ought not to depend on the difficulty of the factual questions involved.

The question is not whether technical questions abound or whether technical decisions can mask manipulation designed to favor particular groups. The question is what process is most likely to ensure that the manipulation does not occur and that facially technical decisions are not used manipulatively. In our view, meaningful judicial review is that process for three reasons. First, the open nature of court decision-making, with public trials, will better deter manipulation and guarantee accuracy than decisions made in private in executive offices. Second, the nature of court proceedings, with discovery and cross-examination, is particularly suited to teasing out and challenging hidden assumptions or masked manipulation. Third, the history of the failure of majoritarian executive and legislative branch decision-making in ensuring voting equality, and the success of court involvement in that context, demonstrates that courts have an important role to play in assuring that those branches of government do not ignore, or affirmatively manipulate, facts important to minorities, whether racial and ethnic minorities, geographic minorities, or others.

The Federal Petitioners attempt to steer this Court away from reviewing the Secretary's decision by declaring that resolution of the statistical dispute in this case "involves an exercise of technical expertise that lies uniquely within the competence of [the executive branch]." (Brief at 33). This argument is wrong for two reasons. First, courts routinely engage in technical analysis in resolving disputes of all kinds. Furthermore, the Commerce Secretary, who is admittedly not a statistician, did not perform technical analyses himself but rather relied on the judgment of various experts in reaching his decision. Second, the Secretary did not rely on his own technical advisors, the Bureau of the Census (the agency empowered by Congress to conduct the census), in reaching his decision. Rather, he rejected the Bureau's strong recommendation in favor of the adjusted census and based his decision on a number of non-technical grounds, including the preservation of the traditional method of census calculation. Thus, Petitioners' argument that this conflict is too technical for courts to determine is belied by the Secretary's own actions.

When constitutional interests are at stake, courts must not abdicate their traditional responsibility of ensuring that those interests are protected. As this Court eloquently stated in Reynolds, "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." 377 U.S. at 566, 84 S. Ct. at 1384.

D. The District Court Must Determine Whether The Commerce Secretary Acted In Good Faith To Ensure A Census That Is As Accurate As Practicable

The constitutional mandate set by Art. I, § 2 that equal representation be afforded for equal numbers requires an objective good faith effort by the political branches to achieve population equality as nearly as is practicable. *Karcher,* 462 U.S. at 730, 103 S. Ct. at 2658 *(citing Kirkpatrick v. Preisler,* 394 U.S. at 530-531, 89 S. Ct. at 1228, 1229). Because the decennial census, as discussed above, directly impacts upon the right to equal representation, *Karcher's* good faith standard applies with equal force to the Secretary's decisions con-

cerning the census. The good faith standard is an objective one. In this context it would have been met only if the Secretary chose a method of calculating the census that was as accurate as practicable.[8] Where there is a practicable method of accurately calculating the census, the Secretary must elect to use such a method. His decision not to does not meet the standard of good faith, regardless of his subjective intent.

The good faith standard and the practicable accuracy requirement are two sides of the same coin: they are concepts created in the recognition that precise mathematical precision in the equal representation context is impossible and that certain practical considerations have to be taken into account. *See Karcher v. Daggett*, 462 U.S. 725, 730 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). While there are clearly impractical methods of determining the census that could hypothetically result in a perfect count of the population, those methods are not required by *Karcher's* good-faith standard, and Amici do not argue that the Secretary should consider them. Instead, Amici contend that because the Secretary was provided with an indisputably practicable alternative to the traditional means of taking the census, namely, the PES method, the only question that remains in the good-faith analysis is whether the PES method provides the most accurate census. If it is determined by the District Court upon remand that the PES method provides a more accurate census, then the Secretary's failure to use that method violated his good-faith obligation to ensure

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[7] Petitioners argue that *Karcher's* good faith requirement is inapplicable to the census and apportionment process because disparities between State districts would be of a "magnitude that would be unacceptable in the context of [intra]state districting policy." (Brief at 40, n. 30). This argument is untenable. Neither the Court of Appeals nor Amici expect an absolutely precise census. What the appeals court held, and what Amici argue, is that the federal government must make a good-faith effort to achieve a census and apportionment that is as accurate as possible. As the Court of Appeals declared, "[t]he impossibility of achieving precise mathematical equality is no excuse for not making this mandated good-faith effort." 34 F.3d at 1129.

equal representation and his decision not to use the adjusted census must be overturned. If it is determined that the PES method does not provide a more accurate census, then the Secretary acted in good faith in electing not to use it, because the unadjusted method provided a census that was as accurate as practicable.

Amici do not concede that the unadjusted census provides a more accurate count of the nation's population. Furthermore, if the PES methodology provides at least as distributively accurate a count as the unadjusted census and alleviates the historic undercount of racial and ethnic minorities, the Secretary's failure to use the adjusted census does not meet the good faith standard. The use of data that, by all accounts, historically undercounts racial and ethnic minorities is simply wrong. There is no rationale for its continued use if an equally accurate and more just method exists.

CONCLUSION

For these reasons, this Court should affirm the Second Circuit's remand to the District Court for review of the Secretary's decision not to use the adjusted census under the standards stated above.

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Respectfully submitted,

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